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A NEW EQUITABLE INTEREST IN LAND*

In *Errington* v. *Errington*[1] the Court of Appeal has recognised a new interest in land. This is what journalists call "news," and news moreover that is calculated to excite our admiration or our pity according to our individual views upon the underlying purpose of the law. To some this judicial adventure will represent normal evolution, to others it will smack of blasphemy. It concerns that Cinderella of the common law—the licence to enter land for a particular purpose. Its immediate, though not its ultimate, origin is the view expressed in 1915 in *Hurst* v. *Picture Theatres Ltd.*[2] and supported by high authority in *Winter Garden Theatre Ltd.* v. *Millennium Productions Ltd.*[3] in 1948, that a contractual licence, followed by entry into occupation of the land, cannot be revoked in breach of contract and that an injunction is available to the licensee to restrain such a revocation. There is nothing startling in this, but its impact upon the law of real property has been stressed by recent decisions. These now make it clear that not only the licensor himself, but also his successors in title, except a purchaser for value of the legal estate without notice of the contract, may be restrained from revocation. Thus has it come to pass that a licensee may acquire an equitable interest similar in certain respects to that arising from an estate contract.

If, for instance, an employee too old to work is told by his employer that he may remain in occupation of his cottage rent free for the rest of his life, the position between the parties has been described as follows by Sir Raymond Evershed M.R. :

> "Since the recent decision in *Winter Garden Theatre Ltd.* v. *Millennium Products Ltd.*[4] I think that although a licence of that kind may, *apart from the terms of the contract*, be revoked, it may now be taken that if the landlord, having made the arrangement, sought to revoke it, he would be restrained by the court from doing so. Thus the result is arrived at that the tenant was entitled as licensee to occupy the premises without charge for the rest of his days."[5]

* A public lecture delivered on December 3, 1952, at King's College, London.
1 [1952] 1 K.B. 290.
2 [1915] 1 K.B. 1.
3 [1948] A.C. 173.
4 [1948] A.C. 173.
5 *Foster* v. *Robinson* [1951] 1 K.B. 149, 156.

Errington v. *Errington* [6] goes further than this, since it illustrates the position of a contractual licensee with regard to third parties. The facts were these :

> A father, wishing to provide a home for his married son, bought a house for £750. He paid £250 in cash and borrowed £500 from a building society, the loan being secured by a mortgage on the house, and repayable by instalments of 15s. a week. The legal estate was vested in him and he was responsible for payment of the instalments, but he allowed his son and daughter-in-law to go into possession and told them that if they paid all that was due he would convey the legal estate to them. He entrusted the building society book to the daughter-in-law and told her not to part with it. He died nine years later and by his will left all his property, including the house, to his widow. Up to that time the son and his wife paid every instalment as it fell due, but the son then left his wife and lived with his mother. His wife remained in occupation of the house and continued to pay the instalments.

In an action brought by the widow for possession, the first task of the Court of Appeal was to determine the status of the son and wife in respect of the house. In the view of the court they were not weekly tenants at a rent of 15s. a week, since they lay under no binding obligation to pay the weekly instalments; they were not tenants at will, since the terms of the bargain precluded their eviction as long as they paid the instalments; but they were licensees with a contractual right to occupy the house as long as they made these payments and with an equitable right to call for the fee simple as soon as they had paid all that was due. Thus, provided that they continued to observe the terms of the bargain, they held an equitable interest that was enforceable not only against the licensor personally, but also against his devisee.

The matter was carried a stage further in *Bendall* v. *McWhirter*,[7] where the Court of Appeal was confronted with the particular case of the deserted wife. The rule now established is that a wife who is deserted by her husband is entitled *qua* licensee to continue her occupation of the matrimonial home in which she has been left. This licence is irrevocable by the husband during the subsistence of the marriage, though at his instance the court has a discretion under section 17 of the Married Women's Property Act to terminate it earlier. *Bendall* v. *McWhirter* decided that within these limits the licence is effective against the husband's trustee in bankruptcy. Somervell L.J. and Romer L.J. put this on the ground that the husband's inability to determine his wife's occupancy constitutes a clog or fetter upon his ownership of the house and that, since his property passes to the trustee subject to all the equities and liabilities which affected it while in his hands,

[6] [1952] 1 K.B. 290.
[7] [1951] 1 All E.R. 1307.

the house in this case must pass subject to the fetter of the irrevocable licence. Denning L.J., while agreeing that this was a sufficient *ratio decidendi*, favoured a more general approach to the question. In his view the wife's right to occupy the land is indistinguishable from the similar right of a contractual licensee, and therefore she acquires an equitable interest binding to the same extent as other equities on the husband's successors. This equation of a licensee's right with an equitable interest was preferred by Jones J. in *Ferris* v. *Weaven*,[8] where he held that the licence of a deserted wife to remain in the matrimonial home was binding upon a purchaser for value who had notice of her possessory right.

This catena of authorities, then, establishes two propositions that are better dealt with separately.

First, there is an equity in a contractual licensee to restrain a breach of the contract by the licensor.

Secondly, this equity is enforceable against third parties to the same extent as any other equitable interest, such as an estate contract or restrictive covenant.

The first proposition rectifies a manifest injustice of the common law. A licence, *per se*, that is, *one not associated with a contract or with the grant of a proprietary interest*, is admittedly nothing more than an indulgent permission to enter and make some use of land, as, for example, to use it for the temporary storage of goods. It does not create, and is not intended to create, any proprietary interest, such as a tenancy at will or for years. It is an act of benevolence that can be reversed at any moment. It imposes no obligation upon the licensor. It merely condones what would otherwise be a trespass.[9] As Salmond says in his book on *Jurisprudence*:

> "If a landowner gives me a licence to go upon his land, I have a right to do so in the sense in which a right means a liberty; but I have no right to do so in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his lands, he has an equal right or liberty to prevent me. The licence has no other effect than to make that lawful which would otherwise be unlawful." [10]

But the position is, or at least should be, far different if the licence is connected either with a grant of property or with a contract. Common law has always readily admitted that it is irrevocable in the former case. If it is accessory to the grant of some proprietary interest in land or in goods on the land, as for example where the grantee of a right of fishery or the purchaser of growing crops is given permission to enter for the purpose of exploiting his interest, it is irrevocable so long as the interest to which it is accessory remains in being.[11] It is coupled with a grant and the licensor

[8] [1952] 2 All E.R. 233.
[9] *Thomas* v. *Sorrell* (1673) Vaugh. 330, 351.
[10] *Jurisprudence*, 7th ed., p. 247.
[11] *Wood* v. *Leadbitter* (1845) 13 M. & W. 838, 844.

cannot derogate from his grant. Common law, indeed, insists that the grant itself should be formally valid, and holds, for instance, that a written contract not under seal allowing a man to shoot over land and to take away what is killed is not irrevocable, since the grant of a profit *à prendre* is ineffective unless made by deed. But the equitable rule, illustrated in another context by *Walsh* v. *Lonsdale*,[12] now is that a contract to grant an interest is treated as if it had in fact been performed by the fulfilment of the formalities required at law,[13] and that therefore the absence of a deed in such a case is no longer fatal.

At common law, however, though a licence coupled with a grant is inviolate, the opposite is the case where all that the licensee can rely upon is a contract. His only remedy if the licence is abruptly withdrawn in breach of contract is the recovery of damages.[14] It is irrelevant that he has entered the land and has incurred expense in the belief that he will be undisturbed. Whether created by deed, whether given for consideration, the licence is revocable at the will of the licensor. During its continuance, the licensee, of course, cannot be treated as a wrongdoer while on the land, but he is liable in trespass if he remains there longer than a reasonable time after revocation.[15] In contemplating this attitude of the common law towards contractual licensees, it is difficult to disagree with the reflection of an American judge, "that it is consistent with no system of morals that a party should be let off from his contract on payment of a compensation in damages"[16] and we may add that it is in no way consistent with the English principles of equity. Even the early common law had some misgivings on the matter. In a case in 1816 a pauper, acting under a licence from the lord of a manor to whom he had agreed to pay a quit rent of half a guinea a year, had built a cottage on the manorial waste and had lived in it for eighteen months. In holding that this was a bare licence withdrawable at any moment, Lord Ellenborough said :

> "We cannot take into our consideration what it may be conjectured a court of equity would determine in this case. Perhaps a court of equity might interfere, but can we say with certainty that it would?"[17]

Let us, therefore, leave the realm of conjecture and see what courts of equity have in fact done to modify a rule, that, however logical it may be, is contrary to natural justice. Equity has not failed to forge the weapons with which to attack the injustice, though the armoury perhaps has remained a little unsystematic. The

[12] (1822) 21 Ch.D. 4.
[13] *Hurst* v. *Picture Theatres, Ltd.* [1915] 1 K.B. 1.
[14] *Kerrison* v. *Smith* [1897] 2 Q.B. 445.
[15] *Wood* v. *Leadbitter* (1845) 13 M. & W. 838.
[16] *Rerick* v. *Kern* (1826) 14 Serg. & R. 267; Aigler, Bigelow & Powell, *Cases on Property*, 2nd ed., vol. 2, p. 318.
[17] *R.* v. *Horndon-on-the-Hill* (1816) 4 M. & S. 562, 565.

Courts of Chancery have been able to invoke several loosely related principles in their determination to grant specific relief to licensees, but their chief weapon has been the doctrine of estoppel by acquiescence. One emanation of this is the rule stated by Sir John Romilly M.R. in 1853.

> "If one man stand by and encourage another, though but passively, to lay out money under an erroneous opinion of title or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the court will not permit any subsequent interference with it by him who formally promoted and encouraged those acts of which he now either complains or seeks to obtain the advantage."[18]

In other words, even a tacit licence is to be regarded as irrevocable if it has been acted on by the licensee. Thus, it has long been established that though a licence is prima facie revocable, yet if the licensee has altered his position for the worse by expending money on the faith of the continuance of the licence, he has an equity to be relieved against its revocation, though the exact nature and extent of the relief will vary with the circumstances. In *Dillwyn* v. *Llewelyn*[19]:

> A father, without executing any conveyance, put a son in possession of a farm and signed a memorandum saying that he had done so in order that the son might build a residence for himself. The son went into possession of the land and laid out £14,000 on the erection of a house. The father died two years later and left a will devising all his land to trustees, just as the father in *Errington* v. *Errington* devised the house to his widow. The son claimed the fee simple from the trustees.

In the view of the common law this licence was not coupled with a grant, for there had been no grant of any interest and, indeed, no contract to make one. Lord Westbury, after showing that the son could not claim as a donee, since equity will never interfere to perfect an imperfect gift, proceeded as follows:

> "But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. . . . So if A puts B in possession of a piece of land and tells him, 'I give it to you that you may build a house on it,' and B, on the strength of that promise and with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract (sic) and complete the imperfect donation which was made. The case is somewhat analogous to that of a verbal agreement not binding originally for the want of the memorandum in writing signed by the party to

[18] *Rochdale Canal Co.* v. *King* (1853) 16 Beav. 630, 633–34. See also *Beaufort* v. *Patrick* (1853) 17 Beav. 60, 74–75; *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 170–71.

[19] (1862) 4 De G.F. & J. 517.

> be charged, but which becomes binding by virtue of the subsequent part performance." [20]

The Lord Chancellor held that nothing but the grant of the fee simple to the son would satisfy the equity that had been raised in his favour by his reliance upon the permission to enter the land. In effect specific performance was decreed of a promise falling short of a contract, and decreed, be it noted, not against the promisor himself, but against his successors in title, the trustees.

A more apt illustration of equity's attitude towards licences is *Plimmer* v. *The Mayor of Wellington*,[21] 1884. In that case:

> In 1848 Plimmer, with the permission of the Crown, constructed a wharf on Crown lands in Wellington Harbour, New Zealand. In 1855, the depth of water having fallen, he made a jetty which stretched a considerable distance into the harbour. Later that year the land was conveyed by the Crown to the Provincial Government. In 1856, at the instance of the Provincial Government, Plimmer extended this jetty a further 112 feet into the harbour, and for seven years thereafter the wharf and jetty were largely used for immigrants and charges for this use were paid by the Government.

The Privy Council held that in the first instance Plimmer occupied the land under a revocable licence to use it for the purpose of a wharfinger, but that the events of 1856 had rendered the licence irrevocable.[22] Their Lordships put it in this way:

> "Is it to be said that when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they, in 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible." [23]

Since the revocable licence was indefinite in point of duration, the effect of its becoming irrevocable was to entitle Plimmer to an indefinite, *i.e.*, practically a perpetual, right to the jetty for the purposes of the original licence.

Another relevant and even more important case is *Beaufort* v. *Patrick*, 1853,[24] where the facts were these:

> A tenant made a private canal across land that he held under a lease for 65 years from one Popkin. Later, "with the full consent and approbation of Popkin," this canal was widened and linked up with the Swansea Canal, the construction of which had been authorised by statute. Compensation was paid to the tenant for the loss of his rights, but no agreement was ever made for buying the interest of the reversioner, Popkin.

[20] At p. 521.
[21] (1884) 9 App.Cas. 699: distinguished in *C. P. R.* v. *The King* [1931] A.C. 414.
[22] At p. 710.
[23] At p. 712.
[24] (1853) 17 Beav. 60.

The Master of the Rolls, Sir John Romilly, was insistent that Popkin, having stood by and permitted the merging of the private waterway with the public canal, could neither have recovered its possession nor have interfered with its use by claiming that his permission was for the duration of the lease only. Equity would not have tolerated his interruption of what he had permitted to be done.

There were, however, further facts involving third parties :

> Before work had begun under the Swansea statute, Popkin mortgaged his fee simple to X. As a result of foreclosure proceedings, the mortgaged property was sold to one Calland, who bought with notice of Popkin's acquiescence in the joinder of the two canals. Later, Calland died, having devised his fee simple to trustees.

The question for the court was whether the equity precluding Popkin from recovering possession of the private canal at the end of the lease equally affected his successors in title, the trustees. The Master of the Rolls had no hesitation in giving an affirmative answer. The testator, Calland, was affected by the equity, since he bought with notice of what Popkin had permitted to be done, and his trustees could stand in no better position. They must receive compensation, but must be debarred from taking possession.

The principle, then, of these and other decisions,[25] is that a supervening equity arising from the expenditure of money by the licensee on the faith of the permission may convert a revocable into an irrevocable licence or may make revocation conditional on terms imposed by the court. It is akin to the principle explained by Lord Cairns in *Hughes* v. *Metropolitan Railway* [26] and stressed in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[27] that if parties have come to a definite arrangement involving certain legal results and one of them has therefore been led to suppose that the strict rights of the other will not be enforced, such enforcement will not be allowed if it is inequitable. If you permit me to erect a shed on your land as a temporary store for the materials required in the construction of my house, your strict legal right is to treat me as a trespasser as soon, for instance, as the shed is complete, but to do so is inconsistent with what I have been led to expect and will not be permitted by equity.

This principle established in the nineteenth century is excellent as far as it goes, but if it is to operate only where considerable money has been expended upon major operations it scarcely goes far enough. In the case of a contractual licence of any kind, *i.e.*, one expressly given in return for consideration, it is surely inequitable that the permission to remain on the land should be revocable at the caprice of the licensor, once it has been acted on by the licensee. If a contract

[25] *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129; *Unity Bank* v. *King* (1858) 25 Beav. 72; *Att.-Gen. to the Prince of Wales* v. *Collom* [1916] 2 K.B. 193.
[26] (1877) L.R. 2 App.Cas. 439.
[27] [1947] K.B. 130.

licenses a music enthusiast to occupy a seat at a gala performance of Gounod's *Faust* under a conductor of international fame it is a strange system of law that tolerates his extrusion before the opera begins. To defeat his expectations in this manner is to inflict an injury for which damages provide no adequate recompense, and if, in the words of Leach V.-C., "courts of equity decree the specific performance of contracts because damages at law may not in the particular case afford a complete remedy," [28] and if the settled practice of those courts, as Lord Uthwatt said, "is to do what they can by an injunction to preserve the sanctity of a bargain," [29] it seems clear that a licensor should be restrainable by injunction from interrupting the fulfilment of the contract. Such a negative decree is indirectly a decree of specific performance, for, though it does not order the licensor to do anything, it prevents him from breaking the contract and so ensures its full enjoyment by the licensee.[30] To grant such a remedy does not necessarily break in upon the common law doctrine that a licence is prima facie revocable, for the particular circumstances may well raise an implied promise by the licensor that he will not prematurely withdraw his permission. That such a promise may be implied was not pleaded in *Wood* v. *Leadbitter* [31] and was therefore not considered by the court. The point was first taken in *Hurst* v. *Picture Theatres Ltd.*[32] where a ticket holder who had been ejected from a theatre recovered damages for assault. It was not, of course, possible in the circumstances for the plaintiff to avoid eviction by obtaining an injunction, but that he was entitled to do so was made clear by Buckley L.J.

> "If the facts here are, as I think they are, that the licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the licence until the play had run to its termination." [33]

As Lord Greene said in the *Winter Garden Case* the contract must first be construed to ascertain whether the licence is revocable at all and if so upon what conditions.[34] Equity will then restrain any revocation which is in breach of the contract as so construed.[35] In the House of Lords, Lord Uthwatt expressed his inability to see any answer to the proposition of Lord Greene,[36] and Lord Simon, referring to *Hurst's Case*, said :

[28] *Udderley* v. *Dixon* (1824) 1 Sim. & St. 607, 610.
[29] *Winter Garden Theatre, Ltd.* v. *Millennium Productions, Ltd.* [1948] A.C. 178, 202.
[30] *Jones* v. *Tankerville* [1909] 2 Ch. 440, 443, *per* Parker J.
[31] (1845) 13 M. & W. 838.
[32] [1915] 1 K.B. 1.
[33] At p. 10.
[34] *Millennium Productions, Ltd.* v. *Winter Garden Theatre* [1946] 1 All E.R. 678, 680.
[35] At p. 685.
[36] [1948] A.C. at p. 202.

> "The licence in such a case is granted under contractual conditions, one of which is that a well-behaved licensee shall not be treated as a trespasser until the event which he has paid to see is over." [37]

This development seems almost inevitable. Once admit that even a tacit licence or acquiescence to enter land is not revocable at will if the licensee has entered and altered his position for the worse, then *a fortiori* the wrongful revocation of an express licence created by contract must also be prevented.

Thus the rule in equity has come to be that every contractual licence implies a promise by the licensor not to revoke the licence in a manner contrary to the intention of the parties. The scope of this implied promise will vary with the particular contract. The intention of the parties must be inferred from the circumstances. The inference may be that the licence is to continue permanently, as in *Plimmer* v. *Mayor of Wellington*; or for the licensee's life, as in *Foster* v. *Robinson*; or until the entertainment is over, as in *Hurst's Case*; or as long as the licensee remains the wife of the licensor, as in *Bendall* v. *McWhirter*; or until a reasonable time to withdraw from the land has been allowed to the licensee, as in the *Winter Garden Case*.

Such, then, is what may be called the *enlarged equity* deducible from the decisions that begin with *Hurst's Case* and end for the moment with *Ferris* v. *Weaven*, and so far as the parties themselves are concerned its validity does not appear to have been impugned.

But now the second question arises and with it a controversy—is the equity to specific performance enforceable against the successors in title of the licensor? Does the licensee acquire a proprietary, not merely a contractual, right? Is it in accordance with principle and authority that the undoubted equity against the licensor should rank as an equitable interest enforceable against all persons who claim an interest in the land, except a purchaser for value of the legal estate without actual or constructive notice of the licensee's right? At least one learned writer in the *Law Quarterly Review*, Mr. H. W. R. Wade, holds it to be unjustifiable on several counts. "It is," he says, "revolutionary to hold that a contract for a licence (not being a contract for sale or lease, or a restrictive covenant) can be enforced against a person not a party to it." [38] Perhaps, however, it may be suggested with respect that the recent decisions illustrate a peaceful penetration, not a revolution. The doctrine of privity of contract was penetrated by the common law courts themselves in *Spencer's Case*, 1588, and by the Court of Chancery in *Tulk* v. *Moxhay*, 1848, and there seems no reason that what was possible and beneficial in an earlier age should become outmoded by the mere passage of time.

Another criticism made by Mr. Wade is that the list of equitable

[37] *Ibid.* at p. 189.
[38] 68 L.Q.R. pp. 388–89.

proprietary interests in land should be regarded as closed [39] and that this invention of a new type will unsettle the law of real property for many years.[40] Similar warnings have been uttered in the past, but they have failed to impede the living growth of English law. For example, in 1834, Lord Brougham, in holding that a covenant which does not run with land at law cannot be made to run with it in equity, adorned his judgment with the following homily:

> "Great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote." [41]

Yet, only fourteen years later, *Tulk* v. *Moxhay* invented the restrictive covenant, a new interest of remarkable virility that nobody then or since has regretted.[42] The very suggestion, indeed, that there should ever be a closing date for the invention of new legal concepts is a little disturbing. If for instance the date 1848, proposed in the present context, were to be taken as the end of the formative period in the field of contract and tort, some rather glaring gaps in the modern law would appear. There would be no tort of conspiracy, no independent tort of negligence and no doctrine of frustration.

A further stricture on the raising of a contractual licence to the status of a proprietary interest is that it will impede the investigation of title. It is feared that a purchaser may have to investigate an infinite variety of incumbrances and may often be ignorant of some fancy or imaginative transaction to which he is a stranger.[43] But the rights of a licensee will in fact be readily discernible. It is true that a contractual licence is not registrable as an estate contract, since it can scarcely be described as a contract by an estate owner "to create or convey" a legal estate. Nevertheless, a licensee cannot claim an equitable interest unless he has entered the land, and entry will make knowledge of his rights available to others, for it is elementary that if a purchaser fails to make inquiries of those in possession, whether as tenants or occupiers, he is affected with notice of all equities enforceable by an occupier against the vendor.[44]

The crux of the matter, however, is to test the soundness of *Errington* v. *Errington* by reference, first to expediency, secondly to principle and authority.

Expediency certainly requires that a licence which is specifically enforceable against a licensor shall also be enforceable against his

[39] *Ibid.* p. 343.
[40] *Ibid.* p. 349.
[41] *Keppell* v. *Bailey* (1834) 2 My. & K. 517, 536.
[42] It is curious that the decision excited no comment in the law journals of the period.
[43] 68 L.Q.R. pp. 348–49.
[44] *Barnhart* v. *Greenshields* (1853) 9 Moo.P.C. 18, 32; *Hunt* v. *Luck* [1901] 1 Ch. 45, 49–51; App. [1902] 1 Ch. 428, 432.

successors in title. Equity is said to do nothing in vain, but her power to issue a decree against a licensor will obviously be paralysed if, though liable in damages, he can discharge the land of its equitable burden by a conveyance of the legal estate to a purchaser with notice. This cynical plan was hatched by the licensor in *Ferris* v. *Weaven*,[45] but met the fate that it deserved.

As regards principle, we may start with the rule, established as early as 1663,[46] that the right to specific performance against a party who has made what is now called an estate contract is available against his successors in title. If, said Lord Loughborough, the successor "is a purchaser with notice he is liable to the same equity, stands in his place and is bound to do that which the person he represents would be bound to do by the decree."[47] The question, then, is whether there is authority for the view that the right of a contractual licensee, if it is specifically enforceable, is protected to the same extent. That abundant authority exists seems undeniable if we observe the evolution of the law as reflected in the decisions already discussed. The argument may be summarised in four propositions:

First, the nineteenth-century cases, such as *Plimmer* v. *Wellington Corporation*, recognise that a licensee who has entered the land with the acquiescence of the licensor, and has altered his position for the worse, possesses an equity to specific performance against the licensor personally. In these early cases the acting on the licence has been confined to the expenditure of money.

Secondly, this equity has been enlarged by decisions in the present century. It is no longer measured by the mere expenditure of money on the land. As a result of the obvious approval given in the *Winter Garden Case* to *Hurst's Case*, every contractual licensee who has entered into occupation of the land has an equity against disturbance until the purpose for which the licence was granted has been fulfilled or until the agreed time for its continuance has elapsed.[48]

Thirdly, the nineteenth-century authorities, such as *Dillwyn* v. *Llewelyn* and *Beaufort* v. *Patrick*, establish that the equity based on the acquiescence of the licensor binds his successors in title to the same extent as an estate contract or any other equitable interest.

Fourthly, the enlarged equity of the present century is nothing more than an expansion of that created by the earlier authorities

[45] *Supra*, note 8.
[46] *Taylor* v. *Stibbert* (1794) 2 Ves.Jun. 437, 439.
[47] *Davie* v. *Beardsham* (1663) 1 Ch.Cas. 39.
[48] *Per* Lord Greene [1946] 1 All E.R. 678, 680; *per* Lord Simon [1948] A.C. 173, 191. At p. 202, Lord Uthwatt, though refusing to discuss the correctness of *Hurst's Case*, proceeded to approve the principle there affirmed: "A licensee who has refused to accept the wrongful repudiation of the bargain, which is involved in an unauthorised revocation of the licence, is as much entitled to the protection of an injunction as a licensee who has not received any notice of revocation."

and therefore it is of precisely the same nature and, as regards the persons against whom it is enforceable, on precisely the same footing as its progenitor.

Thus the truth would seem to be that a licence is prima facie personal and does not bind the land,[49] but if fortified by an equity to specific performance it binds the land in the hands of all persons except a purchaser for value of the legal estate without notice.

In conclusion a final glance may be taken at *Errington* v. *Errington*. Even if it is fallacious to regard the present rule that a contractual licence cannot be revoked in breach of contract as an expansion and enlargement of the older equity, nevertheless the facts raised as clear an example as could be desired of estoppel by acquiescence. The licensees, with the acquiescence, indeed at the instigation, of the licensor had entered the land and had made payments exceeding £350 on the assumption that their permissive occupancy would not be disturbed. It would, therefore, be a heroic task to contend that the facts differed in substance from those in such cases as *Dillwyn* v. *Llewelyn* or *Beaufort* v. *Patrick*.

This, however, does not conclude the matter. It is said that *Errington* v. *Errington* is contradictory to *King* v. *David Allen & Sons*[50] in the House of Lords in 1916, and to *Clore* v. *Theatrical Properties Ltd.*[51] decided by a strong Court of Appeal in 1936.

The former can be quickly dismissed. At the time of the action the subject-matter of the licence, a picture theatre, was not even in existence, and one of the admitted essentials of a licensee's equity to specific performance is that he should have entered into occupation of the premises.

In *Clore's Case* the facts were these :

> A agreed under seal to grant to B the front of the house rights in his theatre, *i.e.*, the right to use the refreshment rooms. Later A transferred the theatre to X, B assigned his rights to Y.

The Court of Appeal held that Y could not enforce his rights against X, since the original transaction was a contractual licence enforceable only between the contracting parties.

This decision is a more formidable obstacle than *King* v. *David Allen & Sons*, since the licence had been acted on for many years, but it exhibits certain features that expose it to criticism. The most remarkable of these is the paucity of authorities cited to the court. The report mentions neither the nineteenth-century decisions based on the expenditure of money by a licensee with the acquiescence of the licensor nor *Hurst* v. *Picture Palaces Ltd.* Assuming that the principle laid down by the older decisions has been correctly stated in this article, it is difficult to believe that had it been canvassed it would have been rejected by the court.

[49] *Coleman* v. *Foster* (1856) 1 H. & N. 37.
[50] [1916] 2 A.C. 54.
[51] [1936] 3 All E.R. 483.

The principle, as we have seen, is that a man who has acted to his prejudice upon the faith of an expectation created by another may insist that his expectation shall not wilfully be frustrated. Both these essentials were satisfied in *Clore's Case*. The licence had expressly created the expectation of undisturbed occupation; the licensee had acted to his prejudice by laying out considerable sums upon the installation and maintenance of the necessary equipment. Thus the act that qualified him for relief was the expenditure of money, the very act that was the decisive factor in the earlier cases, and whether the expenditure is devoted to the widening of a canal as in *Beaufort* v. *Patrick* or to the installation of equipment, and whether it is great or small in amount can scarcely be regarded as relevant considerations.

A further point of some significance is that *Clore's Case* was decided in 1936, several years before the more favourable attitude towards contractual licensees adopted in *Hurst's Case* had received powerful support from the Court of Appeal and the House of Lords in the *Winter Garden Case*.

If, then, *Errington* v. *Errington* is viewed in its true perspective, it seems to be nothing more than a reasonable expansion of the equitable principle that a contractual and specific claim to specific land is enforceable against third parties to the same extent as any other equitable interest. This principle has long been applied to the estate contract. It has now been extended to the contractual licence.

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THE SHOCK CASES AND AREA OF RISK

In his classic essay on university politics, "*Microscosmographia*," [1] Professor Cornford discussed the various arguments which can be advanced in favour of doing nothing. Of these, he said, the most important is the thin end of the wedge argument [2]:

> "The *Principle of the Wedge* is that you should not act justly now for fear of raising expectations that you may act still more justly in the future—expectations which you are afraid you will not have the courage to satisfy."

With slight modifications, this argument has at times proved not unpopular in legal circles, but instead of referring to "a wedge" lawyers are inclined to speak of "opening a wide field," which they tend to regard with some alarm. It is difficult to see why, if the field should prove to be a fertile one, this process should be considered with such disfavour. On the other hand, if it should prove, as is generally the case, only of limited extent, then the exaggerated fears have been unnecessary. A striking illustration of the effect of this fear can be found in the brief history of the shock cases, as they have been called, which have tended to vary in spirit from extreme caution to hesitant experimentation.

The history begins with an illustration of extreme caution, because, in *Victorian Railway Commissioners* v. *Coultas*,[3] the Privy Council allowed an appeal from the Supreme Court of Victoria which had held that the respondent, who had received a violent shock owing to the negligence of the appellants, was entitled to damages for the physical illness which had resulted. The Privy Council held that such damages could not be considered "a consequence which in the ordinary course of things would flow from the negligence of the gate-keeper." This, as has been frequently pointed out, is an odd conclusion, because it is not surprising that a woman, who has escaped death by inches, should receive a shock causing her physical injury. The true ground of the case can be found in the fear that a dangerous precedent would be created if nervous shock were recognised as a cause of action. Sir Richard Couch, in delivering the judgment of the Board, said [4]:

> "Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would

[1] 4th ed., 1949.
[2] p. 15.
[3] (1888) 13 App.Cas. 222.
[4] p. 225.

be greatly increased, and a wide field opened for imaginary claims."

Their Lordships pointed out that there was no previous case on this point, and they declined to establish a precedent. At first sight, the absence of precedent is a strong argument against such a cause of action, but there are two possible explanations for it. The first is that, even under modern conditions, the number of instances where a person is made physically ill owing to a shock seems to be strictly limited. A mere temporary upset would obviously not be sufficient to found a cause of action so that it would be necessary to prove that a serious illness had resulted. In the past, before the mechanical development of the nineteenth century had taken place, the number of instances where shock had caused an illness must have been even more limited. Moreover, in those days the medical profession would have found it more difficult to establish a connection between the shock and the physical result than it would at present with the increase of modern knowledge on this subject. The second explanation is the technical one that trespass to the person involves some physical impact. This physical impact having been established, the court never had any difficulty in recognising that pain and suffering could constitute an element of damage, but in the absence of physical impact, it was more difficult to determine what tort had been committed merely by giving a mental shock to another. It was not, therefore, until the action on the case for negligence became recognised as an independent tort that there was a convenient pigeon-hole in which it could be placed. Even today this problem is still of academic difficulty although, since the abolition of the forms of action, it is no longer of practical importance. On this point Professor Winfield has said [5]: "It is not clear from the authorities whether nervous shock is a substantive tort or a particular instance of damage flowing from the commission of some particular tort."

The *Coultas Case* was received with little enthusiasm, and, as it was a decision of the Privy Council, it was never regarded as binding on the English courts. In 1897, in *Wilkinson* v. *Downton*,[6] Wright J. held that the defendant who had, as a practical joke, told the plaintiff that her husband had been seriously injured in an accident was liable for the illness she suffered owing to shock. The learned judge stated the grounds for his conclusion in a single sentence [7]: "The defendant has . . . wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her." It is important to note that in this case (a) the defendant intended to give the plaintiff a shock, although he obviously did not intend the serious consequences that followed.

[5] *Law of Torts*, 5th ed., 1950, p. 78.
[6] [1897] 2 Q.B. 57.
[7] pp. 58, 59.

No question could, therefore, arise whether or not the defendant could reasonably foresee that his wrongful act would cause a shock to the plaintiff. The fact that he acted wilfully established his foresight. It is for this reason that the wilfulness of his act constituted an essential element in establishing his liability. (b) The shock which the plaintiff suffered was not due to any fear of injury to herself, but was due to fear of the injury which her husband had suffered. These two points are of importance when the law as a whole has to be considered.

The case which, however, may be said to have finally established shock as a cause of action was *Dulieu* v. *White*.[8] In this case the defendant's pair-horse van, which had been negligently driven, broke into a public-house belonging to the plaintiff's husband and frightened her while she was standing behind the bar. As a result she suffered a miscarriage. There was little or no discussion concerning the area of physical risk, the court reaching the conclusion that[9] "the legal obligations of the driver of horses are the same towards the man indoors as to the man out of doors." Kennedy J. stated that the duty of care was owed to "either persons lawfully using the highway or property adjoining the highway or persons who, like the plaintiff, are lawfully occupying that property," but it was not necessary for him to consider the further question whether such a duty would have existed to persons who lived some distance from the highway. Thus, if the horses had jumped a fence and injured a person a quarter of a mile away it is difficult to believe that the learned judge would not have held that such a person had a cause of action. The area of foreseeable risk must in every case be a question of fact depending on the particular circumstances. This is a question which is not peculiar to the shock cases, but arises whenever reasonable foresight is at issue.[10]

The only question in the *Dulieu Case* was whether a physical injury caused by a mental shock could sustain a cause of action. Kennedy and Phillimore JJ. both reached the conclusion that there

[8] [1901] 2 K.B. 669.
[9] p. 672.
[10] I have discussed this question in my article "The *Palsgraf* Case," in *Essays in Jurisprudence and the Common Law*, 1931. In that case a railway guard in assisting a passenger to board a train negligently knocked a package from his arms. A violent explosion followed, the package having contained fireworks, of which fact the guard was ignorant. The concussion knocked over some scales standing a considerable distance away, and in falling they injured the plaintiff. The New York Court of Appeals held by a majority that the plaintiff did not have a cause of action as the guard could not reasonably have foreseen that his negligent act might injure the plaintiff. It is clear that if the guard had known that the package contained fireworks then the defendant railway company would have been liable. This case is authority for the view that there is no such thing as an absolute area of risk. It depends on the nature of the injury that may be caused, and on the reasonable foresight of the actor, having regard to his knowledge of the circumstances. Thus the area of risk of physical injury may extend to only X yards, while the area of risk of emotional injury may extend to Y yards.

was such a duty where the damage followed reasonably and naturally from the shock. Kennedy J. rejected the view expressed in the *Coultas Case* that it would be dangerous to recognise such a cause of action [11]:

> "I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."

Having reached this conclusion, Kennedy J. seems, however, to have felt that the door must not be open too wide, and therefore he held that the only shock which could be recognised was one relating to the person himself. He said [12]: "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, or towards the property of B or C." This limitation the judge based on the ground that it was not "reasonably or naturally to be expected" that a person would be injuriously affected by seeing the injury of another. The learned judge, who had cited *Wilkinson* v. *Downton* [13] with approval, did not explain at any length why it was reasonable and natural for a wife to receive a shock when hearing of her husband's injury but not natural for her to do so when actually seeing the accident. He held that in the *Wilkinson Case* the defendant had intended to cause a shock, but that where the shock was not intended, as in *Smith* v. *Johnson & Co.* (unreported),[14] "the defendant neither intended to affect the plaintiff injuriously *nor did anything which could reasonably or naturally be expected to affect him injuriously.*" It is this conclusion which is assumed to be self-evident in the words I have italicised which, with all respect, is open to question, for if A kills B in the presence of C it may be suggested that it is reasonable and natural to expect C to suffer a shock which may affect him injuriously.

In his concurring judgment, Phillimore J. makes the interesting point that the fact that the plaintiff was not on the highway might strengthen her claim to a cause of action because [15] "it may be (I do not say that it is so) that a person venturing into the streets takes his chance of terrors." The shock which the plaintiff received was all the more severe because she could hardly have foreseen that, sitting behind the bar, her safety would be endangered by a runaway horse.

[11] p. 681.
[12] p. 681.
[13] *Supra*, n. 6.
[14] p. 675.
[15] p. 684.

In 1919 the Court of Appeal, in *Janvier* v. *Sweeney*,[16] followed *Wilkinson* v. *Downton* when it held that an intentional false accusation against a third person which shocked the plaintiff to such a degree as to cause a severe physical illness could ground a cause of action. Here again it must be noted that the plaintiff's fear was not for herself, but for a third person. Bankes L.J. accepted the principle[17] "that terror wrongfully induced and inducing physical mischief gives a cause of action." There is no suggestion here that the terror must be terror of personal injury, and that such terror cannot ground a cause of action if the person who has suffered it is outside the area of physical injury.

In 1925 the much-disputed case of *Hambrook* v. *Stokes Bros.*[18] was decided by the Court of Appeal. The plaintiff sued under the Fatal Accidents Act for the death of his wife caused by the negligence of the defendants whose unattended lorry had run down a steep street. The street took a bend at the end so that she could not see what had happened to her children from whom she had just parted, but who, as she knew, were in the street. All that she saw was the lorry turning the bend and running into a wall. Fear that her children had been injured gave her a shock which so injured her that she became ill and later died. It is important to note that, although the woman had not herself seen the lorry pass her children, nevertheless, as Bankes L.J. said[19]: "The shock resulted from what the plaintiff's wife either saw or realised by her own unaided senses, and not from something which someone told her." He held that it was a normal consequence of the defendants' negligence that a mother, knowing that her children were in such peril, would receive a shock, and that this was sufficient for the purpose of the action. It was not necessary for a person to fear merely for his or her own safety. The learned Lord Justice did not discuss the question whether or not the woman was within the area of physical risk, as the defendant admitted negligence on this point. Atkin L.J. apparently placed greater emphasis on the matter of physical danger to the woman herself. He said[20]: "I agree that in the present case the plaintiff must show a breach of duty to her, but this he shows by the negligence of the defendants in the care of their lorry." This suggests that the learned Lord Justice reached his conclusion on the ground that the plaintiff's wife was within the area of physical risk, but it does not follow from this that he would have held that the area of emotional risk was insufficient for this purpose if the question had fallen for decision. It is not even clear whether the mother was in fact subject to

[16] [1919] 2 K.B. 316.
[17] p. 322. It is of interest to note that Bankes L.J. delivered the leading judgment in *Hambrook* v. *Stokes*, *infra*.
[18] [1925] 1 K.B. 141.
[19] p. 152.
[20] p. 156.

physical danger herself as the runaway lorry might not have been able to negotiate the bend. Sargant L.J. dissented on the ground that, as the fear of the woman was due to the danger to her children, the damage suffered was "not within ordinary or reasonable expectation." He distinguished the *Wilkinson Case* on the ground that there the wrongdoing had been intentional. He held that the duty of the defendant was limited [21] "to control his vehicle so as to avoid causing physical injury to those on or near the highway." A threat to his own safety would constitute a direct interference with the personality of a person on the highway, but a threat to the safety of someone else would have no such effect.

In 1939 the Court of Appeal decided the remarkable case of *Owens* v. *Liverpool Corporation*.[22] In this case a tram belonging to the defendants negligently ran into a hearse, with the result that the plaintiffs, who were mourners in the next carriage, received such emotional shocks that they became ill. The court held that they were entitled to recover as they belonged to a class of society which would be particularly affected by such an event. It is important to note that in this case the plaintiffs were apparently within the area of possible physical injury. In *Bourhill* v. *Young* [23] the House of Lords overruled the *Owens Case*, not on the ground that the plaintiffs were outside the area of risk, but on the ground that it was not reasonably foreseeable that an ordinary person would receive a shock of such magnitude as to cause illness from such an incident. Lord Wright said that [24] "the particular susceptibility there was to my mind beyond any range of normal expectancy or of reasonable foresight." This shows that the "area of physical risk" doctrine is not necessary for the purpose of enabling the courts to reject extravagant claims. The ordinary reasonable foresight doctrine will give sufficient protection in such cases.

In 1942 in *Bourhill* v. *Young* [25] the House of Lords held that the respondent, who was the executor-dative of the late John Young who had been killed when his motor-cycle collided with a motor-car, was not liable for the shock suffered by the pursuer-appellant. This may be said to be one of those cases where the decision is so obvious that it is not necessary for the judges to analyse their reasons in the greatest detail, with the result that there may be dicta which give rise to trouble in future cases.[26] The pursuer, who had alighted from a tram, heard a motor-cyclist passing on the other

[21] p. 162.
[22] [1939] 1 K.B. 394.
[23] [1943] A.C. 92.
[24] p. 110.
[25] *Supra*, n. 23.
[26] In *Mills* v. *Armstrong* (1888) 13 App.Cas. 1, 12, Lord Bramwell said: "At present I will only observe that the four judges were great lawyers, and I believe that an experienced lawyer may be, as it were, instinctively right without at the moment being able to give a good reason for his opinion."

side, and then there followed a loud noise which was due to the motor-cyclist's collision with a motor-car. Thereafter she saw blood on the roadway as a result of the accident. The noise and the sight of the blood gave her such a shock that she suffered a miscarriage. It is clear from the judgments that the pursuer was never in any danger herself nor was the shock she suffered based on fear. It was based, as Lord Thankerton pointed out [27]: "Merely on the sound of the collision." Similarly, Lord Russell of Killowen said [28]: "She was frightened by the noise of the collision." He added that he was unable to see how anyone could reasonably anticipate that "the resultant noise would cause physical injury by shock to a person standing behind the tramcar." Lord Wright pointed out that [29]: "She merely heard a noise which upset her without her having any definite idea at all." Lord Porter said [30]: "In order, however, to establish a duty towards herself, the appellant must still show that the cyclist should reasonably have foreseen emotional injury to her as a result of his negligent driving and, as I have indicated, I do not think she has done so." Later,[31] he pointed out that: "No exceptionally loud noise or particularly gruesome sight is alleged." It is of the greatest importance to note that the foresight which Lord Porter requires is foresight that emotional injury may be caused to the plaintiff. This obviously is not the same thing as foresight concerning direct physical injury, although in most cases they will coincide. It was not necessary in the *Bourhill Case* to distinguish between the two because the plaintiff, who was behind the tramcar, was both physically and emotionally outside the area of the accident as she was not in any personal danger and also she could not see what was happening to other persons. It is submitted that it is reasonable to interpret the judgments in the *Bourhill Case* as being concerned only with foresight of emotional injury.

There are, however, a number of dicta in the *Bourhill Case* which give support to the "area of physical injury" view. Thus Lord Thankerton said [32]: "I shall confine myself to the question of the range of duty of a motor-cyclist on the public road towards other passengers on the road," and Lord Macmillan accepted Lord Jamieson's conclusion in the court below that [33]: "The duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway." It may be suggested that this limitation of a driver's duty may be too narrow in those cases in which the driver ought reasonably to foresee that his negligence may injure persons neither on the highway nor in adjoining premises. Thus if a driver of a car has been warned that

[27] p. 99.
[28] p. 101.
[29] p. 111.
[30] p. 119.
[31] p. 120.
[32] p. 98.
[33] p. 104.

a lorry carrying a load of high explosives is driving on the highway, and he nevertheless negligently collides with it, it is submitted that his executors will be held responsible for damage done not only to those in adjoining premises but also to those within the range of a high explosive. These dicta can hardly have been intended as a considered pronouncement that in no case can there be recovery for an emotional injury unless the person who has suffered the shock was also in physical danger, because this was not necessary for the decision of the case.

This point has, however, arisen in the recent case of *King* v. *Phillips*.[34] In that case the plaintiff was at an upstairs window when she heard a scream which she identified as that of her little boy. At a distance of some 70 or 80 yards she saw the defendant's taxi-cab backing on to the tricycle belonging to her son, but she could not see him. She ran down into the roadway where she met him running towards her, he having suffered only a very slight injury. As a result of the shock the mother became ill. The defendant did not deny that he had been negligent in backing his cab without looking, but he argued that he could not be held liable to the mother having regard to the conclusion reached in *Bourhill* v. *Young*.[35] McNair J. accepted this argument saying[36]: "Applying these principles, I have reached the conclusion that in the particular circumstances of this case it cannot be held that the driver of the taxi (or, to adopt Lord Wright's expression, the reasonable hypothetical bystander) could reasonably have anticipated that to back the taxi in the way it was backed, admittedly negligently, *vis-à-vis* the small boy, would cause the injury complained of or any other injury to the boy's mother in her home some 70 or 80 yards away. The mother, in my judgment, was wholly outside the area or range of reasonable anticipation." If the area of risk in the shock cases is limited to the area in which physical injury to the person who receives the shock ought to have been in the contemplation of the defendant, then it is clear that the mother was never within that area. On the other hand, if the necessary foresight is concerned only with foresight that a person may receive a shock when witnessing an accident or by becoming immediately aware of it by his own senses, as in the *Hambrook Case*,[37] then anyone within eyesight or earshot is within the required "emotional" area. Thus in the *King Case* the mother, although at a considerable distance, both heard and saw the accident which threatened the life of her son. She was, therefore, more closely connected emotionally with the accident than was the mother in the *Hambrook Case*, although she herself was never in any physical danger as the latter may have been.

[34] [1952] 2 T.L.R. 277.
[35] *Supra*, n. 23.
[36] p. 280.
[37] *Supra*, n. 18.

This brings us to the main problem which remains in the shock cases. If the cause of action is damage due to the unlawful infliction of a shock, why should the area of possible physical injury be relevant? A woman standing at the window of a second-floor room is just as likely to receive a shock when witnessing an accident as she would be if she were standing on the pavement. To say that the careless driver of a motor car could not reasonably foresee such a self-evident fact is to hide the truth behind a fiction which must disappear as soon as we examine it. The driver obviously cannot foresee that the woman at the window will receive a physical injury, but it does not follow from this that he cannot foresee that she will receive a shock. As her cause of action is based on shock it is only foresight of shock which is relevant. I believe that the confusion between foresight of emotional injury and foresight of physical injury is due to four reasons which are not always recognised.

The first reason is that in most cases the foresight concerning emotional injury and that concerning physical injury are identical, with the result that the courts tend to assume that this must be true in all cases. The result is that a test which is applicable to a physical injury is regarded as equally applicable to an emotional one, although, in fact, there may be no connection between the two.

The second reason is that before the emotional injury was recognised as a separate tort, it was given recognition only as a type of damage resulting from a physical injury. In these cases shock followed the physical injury, while in the cases with which we are concerned physical injury follows the shock. Although there is an obvious and fundamental difference between the two, nevertheless it has been difficult for the courts to rid themselves of the idea that in some way or other the shock which the person has suffered must be connected with some pre-existing physical injury or danger to himself.

The third reason is the old argument concerning "the wide field," expressed in a novel manner. It is suggested that unless the person who receives the shock is himself within the area of physical danger, then anyone, however far away and unconnected with the accident, might bring such a claim. This point was made in the American case of *Waube* v. *Warrington*,[38] in which the Wisconsin Supreme Court held that a woman, who received a fatal shock when she witnessed from the window of her house an accident in which her son was killed, was outside the area of reasonable foresight on the part of the defendant driver because she herself was not within the area of physical harm. In supporting this conclusion Professor Magruder has said [39]: "To impose liability in *Waube* v. *Warrington*

[38] (1935) 216 Wis. 603.

[39] Professor Calvin Magruder (1936) 49 Harv.L.R. 1033, 1041.

it would have been necessary to predicate a duty of care so to operate an automobile as to avoid unreasonable risk of shock or emotional distress to others not in the field of physical danger through impact. The court rightly appreciated that this would greatly enlarge the extent of the duty of care." With all respect, it is doubtful whether the area would be enlarged to any appreciable extent by holding that the negligent driver ought to be held responsible in these circumstances, but even if this conclusion did extend the duty of care, this would not be a persuasive argument against such an extension. If it is reasonable and just that a person should be held liable in such circumstances, why should he escape liability merely because there is a possibility that others, in similar circumstances, will also be held liable? If it is argued that such an extension may lead to illegitimate claims, the answer is that similar fears, expressed when shock was first recognised as a cause of action, have proved to be groundless. Fear is an unsatisfactory foundation on which to build a legal doctrine.

The final reason is that the "area of physical risk" seems to give a scientific or mechanical answer to the scope of the defendant's responsibility. It becomes a simple question of physical measurement. This emphasis on physical tests is related to the nineteenth-century desire to equate the law with the physical sciences, but all such tests have proved illusory. The measure of legal responsibility must still depend on a value judgment, and this cannot be answered satisfactorily by measuring the number of yards which separate the defendant from the person who has suffered an injury from his act.[40] It is submitted that the only

[40] In *Best* v. *Samuel Fox & Co.* [1952] 2 All E.R. 394, the House of Lords held that a wife had no right of action for loss of the consortium of her husband. In his speech Lord Goddard C.J. said (at p. 398): "But what duty was owed here by the employers of the husband to the wife? If she has an action in this case so must the wife of any man run over in the street by a careless driver. The duty there which gives rise to the husband's cause of action arises out of what may for convenience be called proximity: the driver owes a duty not to injure other persons who are using the road on which he is driving. He owes no duty to persons not present except to those whose property may be on or adjoining the road which it is his duty to avoid injuring." With the greatest respect, this argument, based on proximity, ought similarly to lead to the conclusion that a husband cannot recover damages for loss of his wife's consortium if she is injured in a road accident. Nevertheless a husband has such a cause of action. In his case the driver owes him a duty not to injure his wife even though he himself is not present. The duty of care is therefore not limited by physical proximity. The other grounds on which Lord Goddard based his judgment are, if we may say so, more conclusive.

The proximity argument almost defeated the claim of the rescuer in *Haynes* v. *Harwood* [1935] 1 K.B. 146, for in that case the police constable was inside a police station when he first saw the bolting horses. He was therefore outside the area of physical danger at the time when the defendants' servant negligently left the horses unattended. Nevertheless he was held to be entitled to recover on the ground that the defendants ought to have foreseen that a courageous man might leave a place of safety so as to attempt a rescue. Similarly foresight concerning nervous shock ought not to depend on the logically irrelevant fact that the person who suffers the shock is or is not within the area of physical danger to himself.

rational and satisfactory test is one based on reasonable foresight that the wrongful act may, in the circumstances of the particular case, give to another person so violent a shock that physical injury may result from it. The nature of the accident, the position of the person who receives the shock, the relationship between the person who receives the shock and the person who has been injured, are all facts which may be relevant in determining liability, but no one of them can be regarded as conclusive.

This brief discussion of the few English cases on the subject of shock may lead us to the following tentative conclusions:—

(1) The fear that recognition of shock as a cause of action may give rise to a large number of unjustifiable claims cannot be supported by experience. This fear was expressed by the Judicial Committee in the *Coultas Case*,[41] but it has been disproved by the fact that the number of cases which have arisen since such a cause of action was recognised in *Dulieu* v. *White* [42] can be counted on the fingers of a single hand. In trying to establish a rational principle in this branch of the law, it is not necessary, therefore, to have this fear in mind.

(2) As Lord Macmillan said in *Bourhill* v. *Young*,[43] "It is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact." The only question that remains concerns the extent of this action.

(3) This action will lie whenever a person is placed in reasonable fear of immediate personal injury to himself provided that the defendant could reasonably have foreseen the risk and ought to have guarded against it.

(4) There is some doubt whether this fear must be limited to fear for oneself or can extend to fear for another. In the *Wilkinson* [44] and the *Janvier* [45] *Cases*, the fear was obviously in relation to a third person, as the plaintiffs in those cases were never in any physical danger themselves. In those cases the defendants had intended to frighten the plaintiffs, so that they had absolute foresight that the plaintiffs would receive a shock. It is submitted that the necessary liability will also be established if such a shock is reasonably foreseeable in an action founded on negligence. The only distinction between wilful and negligent shock is that in the former the foresight of shock is absolute, being intentional, while in the latter it is relative, depending on the facts of the particular case.

[41] *Supra*, n. 3.
[42] *Supra*, n. 8.
[43] p. 103.
[44] *Supra*, n. 6.
[45] *Supra*, n. 16.

(5) If we grant that it is reasonably foreseeable that an accident to a near relative will cause such a shock, does it follow that an accident to a stranger will have a similar result? It is submitted that the answer here must depend on the nature of the accident, and that it is contrary to human experience to say that in no circumstances is it reasonably foreseeable that one who sees a violent accident will receive a dangerous shock. If the person threatened is a husband, wife or child of the person receiving the shock, the foreseeability is, of course, greater than in other circumstances, but it is a gloomy view of human nature which suggests that the sight of the death or injury of someone else cannot create such a shock. It must always be a question of reasonable foresight, and this cannot depend on arbitrary categories.

(6) The most difficult problem is where the person does not see the accident himself, but is told of it by a third person. It has been argued that if recovery were permitted in these circumstances, then there would be a great number of fabricated cases, and that it is dangerous to open the door too wide. It is exceedingly doubtful whether this is true. If it were true, it would hardly be a justifiable ground for denying a right to recover to persons who had genuinely suffered in such a way. The reason for denying recovery in these circumstances is, I believe, a more rational one. It is based on the ground that an ordinary person who hears about an accident will not have the same violent physical reaction as one who has actually witnessed it. I may read in the newspaper a detailed account of an accident, but this will obviously not have the same effect on me as witnessing the accident at first hand. The ground for excluding liability in these circumstances is therefore based on ordinary experience. But even here it would be dangerous to state the rule in too categorical a manner because there may be special circumstances which may make it reasonably foreseeable that mere repetition will cause such a shock. Thus a person ought to be held liable if he intended the repetition to cause the shock. Such cases must, however, in the nature of things be exceedingly rare.

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CORPORATE TAXATION—A COMPARATIVE STUDY

In the field of taxation, as elsewhere, many problems have resulted from the use of the corporate form. If, as a general rule, companies are formed in order to make profits for their shareholders, it might prima facie seem sufficient that those profits should be taxed when they reach the shareholders' hands. But such a simple solution is invariably rejected, and for several reasons. In the first place, its adoption would present widely varied opportunities for tax avoidance to those in control of companies. Secondly, revenue authorities dislike, apparently, the wait until such profits reach the shareholder, especially when they realise that taxation " at source " may be an addition, rather than an alternative, to taxation of the shareholder. The cherry is, after all, big enough to survive two bites ! And it must be admitted that the revenue authorities find, in this connection, ample justification for their viewpoint in the concept of legal personality.

If it be conceded that companies, as such, must be taxed, the next step is to devise the best method of so doing. This might appear simple, and, as an American writer has pointed out,[1] a suitable technique could probably be worked out if only the relationships between companies and their shareholders were everywhere uniform. It is, in fact, far from simple to devise an optimum method even within the range of, say, English public companies, a range which is narrow when compared with that in the United States between the " incorporated pocketbook " (a " one-man " holding or investment company) and the giant industrial corporations. Nor is this the whole of the difficulty, for there is an equal lack of uniformity in the relationship between individual companies and the economy as a whole. This would make it difficult to employ any simple, general method of corporate taxation as a means of fostering economic development. In these circumstances, therefore, it is only to be expected that the various legal provisions relating to corporate taxation should be both detailed and complicated. It is proposed to examine in the present study the laws of France, the United States and the United Kingdom, to consider the manner in which these systems have solved the problems posed by the above-mentioned factors.

[1] R. Blough: " Problems of Corporate Taxation in Time of War," in 10 *Law and Contemporary Problems* (1943) 108, at p. 110. Another valuable theoretical study of the " mechanics " of corporate taxation is to be found in Capitaine: " Le statut des sociétés holdings en Suisse," in *Actes de la société suisse des juristes*, 1943, pp. 139–162.

In the United States, a tax imposed (in 1909) on the income of corporations—theoretically a franchise tax—preceded by some four years any federal taxation of the incomes of individuals, since such taxation was not possible until after the Sixteenth Amendment of the Constitution. But when an income tax was imposed, the rates of tax paid by individuals and by corporations were for many years identical, and since dividends were excluded from the individual's assessment, the corporation tax was looked upon as analogous to a collection at source.[2] The analogy was correct, of course, only in so far as profits were in fact distributed by corporations, and distributed in the form of dividends. There was in this country a comparable situation so long as the view obtained that companies paid income tax as agents for their shareholders. In *Att.-Gen.* v. *Ashton Gas. Co.*,[3] for example, we find Vaughan Williams L.J. stating that the fact that income tax is assessed on the profits of a company "in no way negatives the proposition that the company is paying the income tax on behalf of the shareholders amongst whom the profits, after payment of income tax, are distributed."[4]

But whilst the House of Lords later[5] rejected this "agency" theory, in the United States, first the rate of tax payable by corporations crept beyond that paid by the individuals, and later dividends ceased to be assessed in the hands of individuals. The result is that whereas the United States corporate earnings are twice subjected to taxation,[6] this is so in the United Kingdom only because of the Profits Tax—an impost of quite a distinct nature, as we shall later see.[7] "The company is not bound," said

[2] Blough, *loc cit.* p. 111.

[3] [1904] 2 Ch. 621, affirmed [1906] A.C. 10.

[4] At p. 627. It was upon this same principle that *Gilbertson* v. *Ferguson* (1881) 7 Q.B.D. 562 and other cases of "double taxation" were decided—see Farnsworth, *Income Tax Case Law*, Chap. 7.

[5] *Commissioners of Inland Revenue* v. *Blott* [1921] 2 A.C. 171; see *per* Viscount Cave at p. 201: "Plainly a company paying income tax on its profits does not pay it as agent for its shareholders. It pays it as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and in that case the payment by the company operates in relief of the shareholder. But no agency, properly so called, is involved."

[6] See, *e.g.*, *Ballantine on Corporations*, at p. 291: "Corporations are taxed on their income and shareholders are also taxed on the dividend distributions which come from the same income. Duplication of tax on income derived through a corporation is an undesirable burden on the use of the corporate form for business enterprise."

[7] The difference between English law and American (and continental) law has been pointed out by Professor Laufenberger in an article in 43 *Revue de Science et de Législation Financière* (1951), p. 52: "La doctrine moderne a relevé qu'à cet égard la structure de l'Income Tax est différente de l'impôt sur le revenu pratiqué en Allemagne, en France et aux Etats-Unis. Tandis que dans ces pays, deux impôts distincts frappent d'abord le bénéfice des sociétés . . . , puis les dividendes mis à la disposition des actionnaires . . . en Angleterre l'Income Tax est unique et ne frappe qu'une fois le même revenu, qu'il soit réalisé par les personnes physiques ou par les personnes morales. Pour que les dividendes soient asujetties a l'impôt comme tel, il

Lord Wright in *Neumann* v. *C. I. R.*,[8] "but only authorised to deduct tax in paying dividends; whether it deducts or not is left to its discretion because the profits once having been taxed in the company's hands, do not bear further tax (apart from surtax) in the shareholders' hands."

In France the development has been along rather different lines, for there was imposed in 1872 a tax on dividends and interests (l'impôt sur le revenu des capitaux mobiliers), which formed a distinct category within the income tax. This facilitated the making of the distinction between taxation of the company and taxation of shareholders, in spite of the fact that the dividend tax referred to was retained at its source by the company.[9] And that distinction is even more clear since the reform of the law in 1948, for the greater part of direct commercial taxation is now based on the contrast between profits made by individuals and profits made by companies; on the one hand we find "la taxe proportionelle sur le revenu des personnes physiques," on the other "la taxe proportionelle sur le revenu des personnes morales." One result of this has been to break the uniformity of taxation of companies and individuals even in respect of the dividend tax. Where one company holds shares in another, and as a result receives dividends from that other company, resort has to be had to a somewhat complicated calculation in order to determine the amount of dividend tax payable without imposing on the receiving company a double taxation.[10]

There is a further consequence of this system in France. The expression "revenu des capitaux mobiliers," is wide, and includes most forms of distributions by companies to their members, so that French law has not had to preoccupy itself with the question of whether distributions had the nature of capital or income. That the question has on occasion arisen we shall see later, but in general

faudrait que l'Angleterre instituât une seconde taxe comparable a l'impôt français sur le revenu des valeurs mobilières. Or cette réforme est incompatible avec le caractère unitaire de l'impôt britannique sur le revenu "—at p. 60.

[8] [1934] A.C. 215, 236.

[9] Thus Professor Hamel writes in his *Droit Fiscal du Commerce*: "Quand on considère l'incidence de l'impôt, on s'aperçoit qu'il est bien payé par les particuliers, et l'on comprend que le decret l'ait rangé dans la taxe sur le revenu des personnes physiques, mais quand on examine son fonctionnement, on voit que c'est par l'intermédiaire de la personne morale qui paie les dividendes et les interets que l'impôt est perçu "—at p. 253.

And in a judgment of February 17, 1933, the Conseil d'Etat declared: "Considerant que l'impôt sur le revenu des valeurs mobilières constitue une charge personelle des actionnaires; que si une société en requitte le montant sans répartition, les sommes ainsi payées ont le caractère d'un supplement de dividende; que les dividendes distribuées aux actionnaires sont prelevées sur les bénéfices, et comme tels doivent être compris parmi les éléments servant de base à l'impôt; que, par suite, c'est à tort que la société requérante à fait figurer aux frais généraux de l'exercice envisagé le montant de l'impôt sur le revenu des valeurs mobilières frappant les dividendes distribués a ses actionnaires "—D. H., 1933, 303.

[10] See a note by M. P. Coulbois in 42 *Revue de Science et de Législation Financière* (1950) p. 645.

the *jurisprudence* of the French courts has laid down that any appropriation by the shareholders resulting from a sharing out (répartition) by the company is taxable.[11] The generality of this view has been emphasised by a recent decree, which includes amongst the sums deemed to have been distributed unless the contrary be proved " les sommes mises à la disposition des associés directement ou par personnes ou sociétés interposées, à titre d'avances, de prêts ou d'accomptes." [12] It is understandable, therefore, when the question arose as to whether a distribution of bonus shares following the capitalisation of reserves should be taxed, that the court should decide in favour of the revenue,[13] and only in 1942 was this decision reversed by legislation.[14] A similar intervention had already taken place in respect of the distribution of premiums on shares—a possible result of a conflict of opinion between the courts. For whilst the Chambre Civile thought that distributions of premiums should not be subject to tax, the Chambre des Requêtes was of the contrary opinion [15]; but this dispute ended when legislation made it clear that all distributions were taxable, whether or not they were paid out of profits.

The form taken by distributions to shareholders is not, therefore, of great importance in the French tax system. This is not true of the United States or this country, where the form of a distribution will give it the nature either of capital or of income. This is of importance in American law, since a special rate of tax is applied to capital gains,[16] so that it is in the interest of the taxpayer to realise as much of his income as possible in this form. Where the taxpayer is a shareholder, with control over corporation policy, this may be done through a complete or partial liquidation,[17] or by the declaration of a stock dividend. As regards the latter, with which we are at present concerned, the position is complicated. In *Eisner* v. *Macomber* [18] the Supreme Court held that a stock dividend was not taxable as income, since it was no

[11] See Hamels, *op cit.*, at p. 319.
[12] Art. iii of the *decret* of April 6, 1950.
[13] Conseil d'Etat, November 30, 1936, D.H. 1937. 71.
[14] *Loi* of August 12, 1942. See Escarra, *Manuel de Droit Commercial*, p. 499. No consideration of bonus shares from the viewpoint of comparative law can be complete without reference to Karl Rauth's *Kapitalerhohung aus Gesellschaftsmitteln* (Graz, 1947), a comparative study which includes a consideration of the taxation aspect.
[15] See Chambre des Requêtes, April 3, 1946, D. 1947. J. 176, and note thereto.
[16] Fifty per cent. of a long-term capital gain (*i.e.*, where the asset has been held over six months) must be included in taxable income for assessment, but the amount of tax paid may not exceed 25 per cent. of the actual gain. So far as dividends are concerned these are defined, for the purpose of Income Tax, by ss. 1–5 (*a*) of the 1917 Act as " any distribution made by a corporation to its shareholders, whether in money or other property . . . out of its earnings or profits accumulated after February 28, 1913."
[17] Liquidation as a method of tax avoidance has been rendered less satisfactory, however, by the Supreme Court in *Commissioner* v. *Court Holding Co.* 324 U.S. 331 (1945). See a note on " Double Taxation upon the Sale of Corporate Assets," in 56 *Yale Law Journal* (1947) p. 379.
[18] 252 U.S. 189 (1920).

more than a book adjustment, no part of the assets of the corporation being separated from the common fund. "Far from being a realisation of profits of the stockholder, it tends rather to postpone such realisation, in that the fund represented by the new stock has been transferred from surplus to capital, and is no longer available for actual distribution." Nor, again, did the distribution in question alter the proportional interest of the shareholder in the corporation's assets.[19] The complication is that a distribution of preference shares to holders of ordinary shares, and conversely, an ordinary share dividend to preference shareholders, have been held by the Supreme Court to be income.[20] These decisions, together with that in *Strassburger* v. *Commissioner*,[21] support the view [22] that only the third ground of the decision in *Eisner* v. *Macomber* remains operative.

Similarly, in this country a distinction is drawn between distributions of capital and income, the former being exempt from taxation.[23] And, as Warrington L.J. pointed out in *C. I. R.* v. *Fisher's Executors*,[24] regard must be had to the form of the distribution, rather than to such extraneous matters as the subsequent realisation of the distribution by the shareholders. "The real question is whether the company did in the present case make amongst its shareholders a distribution of profits. It is well settled that the action of a company in such matters not only binds the shareholders as between them and the company, but determines as between them and the revenue whether the result of the transaction is the receipt by the shareholders of taxable income." [25] Thus the decision in *Fisher's Case*, where a distribution stock was held not to be taxable, was followed in *Whitmore* v. *C. I. R.*,[26] even though the debentures there distributed were redeemed within a few weeks

[19] In *Strassburger* v. *Commissioner*, 318 U.S. 604, where the taxpayer was the sole shareholder and held only ordinary shares, it was held that a stock dividend paid to him in preference shares was not a taxable distribution since it did not alter his interest in the corporation's assets.

[20] *Helvering* v. *Gowran*, 302 U.S. 238 (1937) and *Koshland* v. *Helvering*, 298 U.S. 441 (1936) respectively.

[21] See also note (19) above.

[22] Suggested by Donald A. Kehl in *Corporate Dividends* (N.Y. 1941) at p. 343. See also *Stevens on Corporations*, at p. 456.

[23] *C. I. R.* v. *Blott* [1921] 2 A.C. 171. The distinction ceases to be valid when the company is wound up. Thus it was held in *C. I. R.* v. *Burrell* [1924] 2 K.B. 52, that a share of undistributed profits on winding up is not income. "I cannot see enough in the mere history of the accruer of the assets to the company to enable a distinction to be made for the present purpose between that part of the final distribution of assets of the company which arises from profits of the company capable of distributions as income, and other parts of that distribution"—*per* Sargent L.J. at p. 74. And the French court has, in somewhat similar circumstances, refused to distinguish on winding up between capital accretions and undistributed profits—Conseil d'Etat, March 9, 1936, Rec.Sirey 1937.3.49. See also *C. I. R.* v. *Bell & Nicholson, Ltd.* [1952] 1 All E.R. 428, where a dividend paid out of capital profits was held to be a "net relevant distribution" for the purposes of profits tax.

[24] [1925] 1 K.B. 451.

[25] At p. 465.

[26] (1925) 10 T.C. 645.

of the date of their issue. A similar result will follow where a subsidiary company transfers reserves to its capital account and in consequence makes shares available to a holding company for distribution to the latter's shareholders. But in *Briggs* v. *C. I. R.*,[27] where a holding company with large reserves transferred part of its undertaking to a subsidiary in consideration for an allotment of shares, which shares were distributed to the parent company's shareholders as a bonus, Rowlatt J. held the distribution to be taxable. The parent company had parted with assets, whilst its capital had not been increased. "I do not think a company can have any intention about the capital account of another company. . . . Its intention, so far as it has one as a company, relating to a capitalisation account, must refer to its own capitalisation account. If it has any intention as regards the accounts of another company it may have it as a shareholder but it is not a corporate at all so far as capitalisation is concerned, because that must be the capitalisation, as I understand it, of itself." [28]

In addition to the taxes already considered, some mention must be made of other taxes payable in respect of corporate earnings, *viz.*, the excess profits tax of the U.S., France's tax on undistributed profits and the profits tax in this country. Fundamental to all these is the manner in which profits are computed—a matter which is itself not without problems. Schedule "D" of the Income Tax Act, 1918, simply refers to "annual profits or gains," [29] leaving the meaning of these words to be determined judicially. The French Code des Impôts Directs is more specific, defining taxable profits as "le bénéfice net determiné d'après les résultats d'ensemble des opérations de toute nature effectuées par les entreprises." [30] The phrase "operations carried out by the enterprise" led the courts at first to exclude gains made independently of the company's will, *e.g.*, compensation for exposition or

[27] (1932) 17 T.C. 11. See also *Pool* v. *Guardian Investment Trust, Ltd.* [1922] 1 K.B. 347.

[28] *Per* Rowlatt J. at p. 25. A similar rule is operative in the U.S.—see *Peabody* v. *Eisner*, 247 U.S. 347, where the headnote reads: "A distribution in specie by a corporation to its stockholders . . . of stock in another corporation, which is owned on and prior to that date, must be regarded as part of the stockholders' net taxable income."

[29] The Finance Act, 1937, by which the National Defence Contribution—now the Profits Tax—was imposed, refers to "assessable income tax profits." Similarly, the U.S. Corporation Tax Act, 1909, referred in general terms to "the entire net income" received by the corporation, leaving the details to be filled in by the courts. Thus it was held that the phrase was sufficiently wide to include capital increments—*Hays* v. *Gauley Mt. Coal Co.* 247 U.S. 189 (1918). "Since the conversion of capital often results in gain, the general purpose of the Act of 1909 to measure the tax by the increase arising from corporate activities together with the income from invested property leads to the inference that the portion of the gross proceeds which represents gain or increase acquired after the taking effect of the Act must be regarded as 'gross income'"—*per* Mr. Justice Pitney at p. 193.

[30] Art. 7 (1).

expropriation.[31] But in later cases reliance was placed rather on the next subsection of the code, which defines the net profits as the difference between the value of the assets at the beginning and at the end of the financial year.[32]

An additional complication is introduced where there are subsidiary companies. The interplay of tax legislation and the corporate concept is a subject meriting a separate study, and it must suffice here to pick out certain representative situations and solutions. The practice in the U.S., which is typical, has been summarised as follows: "The corporate entity is generally regarded for tax purposes but may be disregarded in unusual cases. It would not appear that all the decisions purporting to disregard the corporate entity can be explained as resulting from the application of some general principle of law or as being merely a lazy court's method of reaching legal principles, although undoubtedly many decisions may be explained in some such manner. As a practical matter the Bureau of Internal Revenue and the courts do decide cases on the theory that the corporate entity may be ignored in certain classes of tax cases."[33] In France, also, the corporate concept may be disregarded, and the losses of a subsidiary set off against the holding company's profits.[34] This is in its turn reminiscent of the English provision regarding the profits tax, which permits a holding company to give notice requiring that the profits and losses of its subsidiaries be treated as its own profits and losses for the purpose of the tax.[35] But in the absence of a provision of this sort, the judicial attitude in England has, in the main, been one of respect for the corporate concept. Thus in

[31] In the decision by the Conseil d'Etat, March 15, 1946, D.1946.J.216, gains made by a mutual insurance company were exempted.

[32] Art. 7 (2). See also a note on "Conseil d'Etat, June 23, 1947" in 39 *Revue de Science et de Législation Financière* (1947), p. 460. "Répudiant sa jurisprudence antérieure, (la cour) estime que, par la combinaison de ces deux dispositions, le bénéfice imposable résulte de l'ensemble des opérations qui figurent regulièrement au bilan de l'exercice en cours et qui se rattachent en conséquence à sa gestion commercial sans qu'il y ait lieu de rechercher si les opérations ont pour cause un événement dépendant ou indépendant de la volonté du contribuable. En consequence, le Conseil d'Etat a decidé que la plus-value réalisée sur la réquisition d'une auto était imposable."

[33] Cleary, "The Corporate Entity in Tax Cases," 1 *Tax Law Review* at p. 21.

[34] Hamel, *op cit.*, p. 297: "Lorsqu'il y a des groupements ainsi constitués avec des bénéfices qui sont apparemment dispersés, mais qui tous reviennent dans une caisse commune—parce que toutes les actions reviennent toutes entre les mains de la société mère—le Ministre des Finances a le droit de constater cette unité d'activité et de fixer un lieu unique de taxation."

[35] Finance Act, 1937, s. 22 There is likewise a good deal in common between the Income Tax Act 1952, ss. 245–64, providing for the appointment for surtax purposes of the undistributed profits of closely controlled companies, and s. 100 of the U.S. Internal Revenue Code, which imposes a direct surtax on the income of closely held personal holding companies. In France this particular loophole for tax avoidance was narrowed judicially, thanks to the extensive meaning which, as has been noted, is attached to the term "distribution."

Odhams Press, Ltd. v. *Cook*,[36] where a company wrote off a debt due from a subsidiary and sought to deduct this amount from its profits as trading expense, the House of Lords refused to upset the finding of the Commissioners that this was not so deductible.

Where the independent entity of the subsidiary company is recognised, it has to be decided whether dividends from the subsidiary company, having as such been taxed, are to be taxed once more as income when received by the holding company. In this country, as we saw above,[37] shareholders are not assessable for income tax in respect of dividends, but in France special legislation was necessary to avoid this particular form of double taxation,[38] and a law of February 19, 1933, includes in the category of subsidiaries companies 30 per cent. of whose shares are held by another.

It would be difficult, even if one felt tempted to try, to extract any broad principle from the necessarily abbreviated study of a topic which has so many facets. The one striking fact which does emerge is the universality of the problems involved and the similarity of the solutions achieved. A distinguished continental jurist has recently proclaimed the existence of conclusive evidence of the futility of a legislative policy based solely on comparative jurisprudence [39]—but comparative study does enable problems to be seen more clearly and may give an added incentive or even inspiration to those who seek to solve such problems.

GEOFFREY HORNSEY *

[36] [1940] 3 All E.R. 15. In *Julius Bendit, Ltd.* v. *C. I. R.* [1947] T.C. 44, where the appellant company, formed by B.—who was beneficial owner of all its shares—bought goods from B. at less than their market value, thereby increasing its own profits. Macnaghten J. refused to permit the market value of the goods to be substituted for the price actually paid in computing the company's profits for tax purposes, and rejected the argument that the company merely acted as B.'s agent for the sale of the goods. See also Income Tax Act, 1952, s. 469.

[37] *Per* Lord Wright in *Neumann* v. *C. I. R.* [1934] A.C. 215, 236, quoted at p. 28 above. A similar situation is to be found in the U.S.A. It is therefore only in respect of distributions for foreign companies that tax is payable—see *C. I. R.* v. *Trustees of Joseph Reid* (1947) 30 T.C. 431, especially *per* Lord Simonds at pp. 439–440.

[38] " Une société mère touche de sa filiale des revenues soumies a l'impôt, ils ne font que traverser son patrimoine et sont distribués à ses actionnaires et cette distribution entraine une seconde fois la perception de l'impôt. . . . La loi du 30 juillet 1920 (art. 27), bien souvent modifié dans la suite, a pris des mesures destinées à eviter cette double imposition. Les dividendes et revenus frappés une première fois par l'impôt lors l'encaissement par la société ne doivent pas l'être de noveau en cas de distribution aux actionnaires "—Ripert, *Traité Elémentaire de Droit Commerciale*, at p. 611.

[39] Prof. Jean Escarra in 11 *Cambridge Law Journal* (1951) at p. 30.

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INCONSISTENCIES AND INJUSTICES IN THE LAW OF HUSBAND AND WIFE

In the previous article under this title [1] it was submitted that the survival of the fictitious legal "unity" of husband and wife is apt to produce results which may be unfair not only to the spouses themselves but also to third parties, especially in the law of tort. An attempt was made to distinguish between legal rules derived from the fiction that husband and wife are one person in the eye of the law and principles based on the fact that the household is a community of life. One may, perhaps, say that at present the law of husband and wife is an amalgam of three elements. In the first place there is the fundamental principle of separation of property embodied in the Law Reform (Married Women and Tortfeasors) Act, 1935. Secondly, a number of rules, partly formulated by the courts and partly by statute, are to be considered as vestiges of the old fiction of unity of personality, as, *e.g.*, the doctrine of the unity of domicile and section 12 of the Married Women's Property Act, 1882. Finally, Parliament, the courts and administrative tribunals have, in some important respects, taken account of the fact that, despite the rule of separation of property, the consortium of husband and wife is of necessity based on the common enjoyment of worldly possessions destined to the use of the family and that the categories of the law of property and of contract are not well adapted to the regulation of the life of this community. Section 17 of the Act of 1882, the principle of *Balfour* v. *Balfour*,[2] and the doctrine of the "family fund" developed by social insurance tribunals [3] may be said to belong to this third category of norms. Some of the inconsistencies of the present law arise from the co-existence of these three types of legal norms, and many of its injustices from the inability of the courts to confine the rule of separation of property to its legitimate province, or, if one likes, to attach to this principle of separation a gloss by way of what Lord Justice Denning [4] has called a "new equity." The purpose of the present article is to demonstrate this by way of two examples: the mutual rights of the spouses with regard to household savings and the position of creditors *vis-à-vis* household property.

[1] *Modern Law Review*, vol. 15, p. 133, April, 1952.
[2] [1919] 2 K.B. 571.
[3] See below, pp. 47, 48, and Part IV of this Article.
[4] In a recent broadcast on the Third Programme of the B.B.C.

II

HOUSEHOLD SAVINGS

Take this very typical and frequent situation: the husband is a wage earner or small business man who gives his wife a weekly household allowance from which she is supposed to defray the expenses of the household, often including the rent, her personal expenses and those for the children. Through thrift and industry she manages to save part of this money, and, with or without her husband's knowledge, accumulates it on a bank or savings bank account which is likely to be opened in her name. Subsequently there is a quarrel between the spouses, the husband learns of the existence of the account (if he had not known it all the time) and claims it as his own. As the law stands today, there is no doubt at all that he is entitled to do so.[5] This, it is submitted, is a gross injustice and the writer can see no justification whatever for this legal rule. Emotional abhorrence of a legal principle, however, carries us nowhere. We must see how it originated, on what arguments it is based, whether anything can be done to change the law without legislation, and, if not, on what lines legislation might possibly be developed.

As far as the present writer is aware, the rule had its origin in a dictum of Page-Wood V.-C. in 1856. The facts in *Barrack* v. *M'Culloch*[6] were that Barrack brought a suit in equity under the statute 13 Eliz. 5 concerning certain transactions by a man called Mariner which were alleged to constitute an embezzlement of Barrack's money. Some of this money had been handed to Mariner (who was a stockbroker's clerk) by Mrs. Barrack for investment. One of the minor points in the case was whether Barrack, the plaintiff, was able to claim as his own the money thus (seemingly) invested by his wife. On this point, Page-Wood V.-C. said[7]:

> "... the money given by Mrs. Barrack to Mariner was her husband's money. It appears that she took it out of his business, and received it partly from the trustees, who were appointed for the benefit of her husband's creditors. There is no evidence that the husband ever concurred in any act by which his wife acquired property for her separate use. I must, therefore, assume that the money which she gave to Mariner to be invested, without the privity of her husband, was money which belonged to him. It is not like the savings of a married woman out of her separate estate. Any money given to her by her husband for household purposes, or for dress, or the like, and applied by her in making investments in her own name would belong to her husband."

Of course it would—in 1856, *i.e.*, prior to the Married Women's

[5] *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 406.
[6] 3 K. & J. 110.
[7] At p. 114.

Property Acts of 1870 and of 1882. As the law then stood, Page-Wood V.-C.'s dictum about household savings (it was an *obiter dictum* and no more) was not only correct but almost a commonplace. Both at common law and in equity money and other chattels which seemingly belonged to a married woman vested in her husband—and a gift by the husband to the wife required an express transaction by which the property was given to her for her separate use.[8] Normally, it seems, equity, though not insisting upon the use of any particular words for the creation of separate property,[9] did not know of a "gift of separate estate by implication,"[10] at any rate if the spouses were living together, and a court of equity would have refused to hold that, by handing a household allowance to his wife, a husband implicitly agreed that she should hold it for her separate use. This disinclination of courts of equity to imply an intention to create a separate estate goes to the root of the law of married women's property as it stood prior to the legislation of 1870 and of 1882. As Dicey pointed out almost 50 years ago,[11] equity might have superseded the common law not only as regards the women of privileged classes who were in enjoyment of marriage settlements, but as regards all married women, "if the Court of Chancery could have established the principle that on any marriage taking place there was presumably a contract between the intended husband and wife—that the wife's present and future property should be her separate property, held for her separate use by her husband as trustee." This, however, did not happen. Equity failed to draw what might have been a legitimate factual inference from the intention of the parties, and the common law continued to apply in the absence of an express gift to the wife. The common law also invalidated contracts between husband and wife, and, whether we look at it from the point of view of the law of property or from that of the law of contract, anything that Mrs. Barrack took out of her husband's business or received from the trustees acting for his creditors remained his, and anything he might have given her for household purposes remained his as well.

Two years after *Barrack* v. *M'Culloch*, Sir J. Romilly M.R. was confronted with the problem whether the savings of a wife belonged to her or to her husband, where the spouses had been separated for

[8] *Per* Romilly M.R. in *Mews* v. *Mews* (1852) 15 Beav. 529, at pp. 532 *et seq.* citing earlier cases. "There must be some clear and distinct act by which the husband has divested himself of the property, and engaged to hold it as a trustee for the separate use of his wife." This, in any event, appears to have been the law where a direct gift by the husband to the wife was alleged. *Aliter*, perhaps, where the alleged gift by the husband to the wife consisted in his acquiescence in her keeping assets obtained from an outside source, as in *Parker* v. *Lechmere* (1879) 12 Ch.D. 256, see *per* Fry J. at p. 260.

[9] See, *e.g.*, *per* Malins V.-C., in *Re Peacock's Trusts* (1879) 10 Ch.D. 490, at p. 495.

[10] This was subject to exceptions, the most important of which was the case in which the wife carried on a trade: *Ashworth* v. *Outram* (1877) 5 Ch.D. 923 (C.A.).

[11] Law and Public Opinion in England (1905), 1926 ed., p. 382, Note 2.

34 years and the savings had been made out of moneys remitted by the husband for the wife's maintenance and support.[12] The husband attempted to recover back these savings, but the demurrer to his bill against his wife and the bankers was allowed. The Master of the Rolls distinguished *Barrack* v. *M'Culloch* (which had been cited by the husband's counsel), but did so in very cautious terms[13]:

> "As every statement in the bill must be taken most strongly against the plaintiff, I think that upon this statement it cannot be taken in any other way than as an allowance for her separate maintenance and support. This has been going on for 34 years, and having during the whole of that period allowed this, it is impossible for him now to say that this was not money allowed to her for her separate maintenance and support. If so, then, in my opinion, it constitutes part of her separate estate. . . . If . . . it is her separate estate, she was entitled to save any portion she pleased, and to deal with the savings of her separate estate as she thought fit. . . . What evidence have I that the whole of this money is not required for the payment of the wife's debts or for her support and maintenance?"

It appears, despite the cautious language used by Romilly M.R., that where husband and wife lived apart equity might, at any rate in a strong case, have departed from its normal attitude and raised a factual inference of an intention to create separate property, a view reinforced 20 years later when the Court of Appeal held[14] that savings from payments made by a husband to a lunatic wife under an order in lunacy were her separate property.

If we look at these cases not in their historical setting, but pragmatically, *i.e.*, if we analyse the result they produced rather than the reasoning on which they were based, and if we take the risk of reading a little too much into Romilly M.R.'s judgment, we may perhaps say that equity's refusal to imply the creation of a wife's separate estate did not extend beyond those situations in which there was not only a marriage but also a consortium, *i.e.*, cohabitation. If this submission (which is advanced with hesitation) should be well founded, we might go one step further and say that, ultimately, the attitude of equity was subconsciously based on the idea of the unity of the household, *i.e.*, on the same idea which (by means of an afterthought, and in a thoroughly unhistorical fashion) we might regard as the justification of the common-law rules on the unity of husband and wife in matters of personal property. Be that as it may, the dictum of Page-Wood V.-C. in *Barrack* v. *M'Culloch* is understandable only against the background of the general rule that a married woman, living with her husband, was incapable of

[12] *Brooke* v. *Brooke* (1858) 25 Beav. 342.
[13] At pp. 346 *et seq.*
[14] *In bonis Tharp* (1878) L.R. 3 P.D. 76.

having property in money unless it had been given to her for her separate use.

This rule began to die in 1870,[15] its agony lasted for 12 years, and it finally passed away in 1882.[16] With it, one may be permitted to think, died the dictum of Page-Wood V.-C. But judicial decisions or dicta which have been killed by Parliament take their revenge. They rise from their graves and their ghosts have a way of interfering most powerfully and most disturbingly in the drama of the law.

This happened in 1908 in *Birkett* v. *Birkett*.[17] Let it be emphasised strongly, in view of what is to follow, that this was a husband's application under section 17 of the Married Women's Property Act, 1882. That section, as will be remembered, says that "in any question between husband and wife as to the title to or possession of property, either party . . . may apply" to a judge "and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit." He is, in other words, enjoined by law to use his discretion, to decide not according to strict principles governing legal title, but according to what some people would nowadays again call "natural justice." It has been submitted before[18] that this is a most wholesome provision which takes account of the factual unity of the household and is (or might have been) a mitigation of the rigours involved in the rule of separation of property, inaugurated by the statutes of 1870 and 1882, and consummated by the statute of 1935. In *Birkett* v. *Birkett* the husband, an engine driver, went to South Africa in 1903, leaving his wife in England. At that time and during the whole of his absence there were no differences between the spouses. Before 1903 he had, according to the wife's statement (which was not, apparently, contradicted on this point), given her all his earnings and received back from her what he required for himself. Between 1903 and 1907, when he returned, he sent her fortnightly remittances amounting to an average of £2 15s. a week, and also twice sent her birthday presents of £5, mentioning in each case the purpose of the gift. The wife managed to save £135 out of his remittances and put them into a Post Office Savings Bank account in her own name. After the husband's return they quarrelled and separated, and he claimed the money. There was a dispute on the facts with regard to the arrangements they had made (verbally) before his departure. He said he had told his wife he would send her as much money as he could for her to live on and to put away the balance in his name. She denied this and said she could have lived on 30s. a week. The county court judge believed the wife, held that the remittances had been a gift to her and decided the

[15] Married Women's Property Act, 1870.
[16] Married Women's Property Act, 1882.
[17] (1908) 98 L.T. 540 (Divisional Court: Phillimore and Walton JJ.).
[18] *Modern Law Review*, vol. 15, p. 146.

case in her favour. On appeal in the Divisional Court, counsel for the husband referred to *Barrack* v. *M'Culloch*[19] and counsel for the wife to *Brooke* v. *Brooke*.[20] The court allowed the appeal and decided in favour of the husband. Phillimore J. said the county court judge had "misdirected himself upon the admitted facts, or upon the facts as stated by Mrs. Birkett—namely that the money in question consisted of her savings out of remittances made to her by her husband from South Africa and that no arrangement was made between her husband and herself with regard to such remittances." In other words, the learned judge took the view that the husband must succeed even on the facts as stated by the wife. "In such a case the law is well settled that, except in some exceptional circumstances, the money belongs to the husband." *Brooke* v. *Brooke* was such an exceptional case, but "in the present case there was no intention that the husband and wife should live continuously apart. . . . The husband left his wife for temporary purposes only, as the breadwinner of the family, and in such circumstances it is quite clear that the money sent to the wife for the maintenance of herself and family was just as much used for that purpose and any savings out of it kept as if the husband had been away for a week only." Walton J. agreed and said that "it was decided in *Barrack* v. *M'Culloch* that money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and invested by her in her own name, belongs to the husband."

Now, if this had been merely a question whether the case fell on the *Barrack* v. *M'Culloch* or on the *Brooke* v. *Brooke* side of the line, *i.e.*, a case in which the consortium continued or a case in which it had ceased, very much indeed could have been said for the decision of the Divisional Court. Consortium and cohabitation do not cease by physical separation as an objective fact. Their existence or non-existence is based on a "subjective element," on a psychological factor, and spouses may reside together without cohabiting, or temporarily live apart without having put an end to the consortium. If *Brooke* v. *Brooke*, as was tentatively submitted above, was in fact based on the non-existence of the consortium, its principle clearly had no application in *Birkett* v. *Birkett*. However, this was not the legal point which was, or ought to have been, at issue. Nevertheless, on its merits, the decision may have been just in the particular circumstances. One can well believe that the husband intended part of what was in 1907 a large weekly remittance to be saved, the more so because he had perhaps little opportunity abroad for opening a savings account himself. It is not the decision itself which appears to be wrong, but the reasoning on which it was based. In the first place no rigid rule of law should

[19] 3 K. & J. 110.
[20] 25 Beav. 342.

have been applied at all, but the court should have brought its discretion to bear upon such factual inferences as it felt able to draw. In the second place the rule of law itself upon which the court founded its decision was derived from a dictum (not, as Walton J. said, a decision) which had lost its meaning because it had been founded on the wife's incapacity to own personal chattels, an incapacity which meanwhile had been removed by legislation. Counsel for the wife failed to make that point and to mention the Married Women's Property Act. Thus it came about that a dictum of 1856 based on a rule of law abrogated by Parliament in 1882 was, in 1908, raised to the dignity of a legal principle standing, as it were, on its own feet. Neither of the two judges in the Divisional Court disclosed the rationale of that principle or seemed to consider what was its basis.

Nor was this done by the Court of Appeal when in 1943, *i.e.*, after the passing of the 1935 Act, it was seized of the same problem in *Blackwell* v. *Blackwell*.[21] This too appears to have been a husband's application under section 17 of the 1882 Act, although the report does not say so *expressis verbis*. The spouses who had been married in 1925 separated in 1941 when a sum of £108 was standing to the wife's credit in the Oxford Co-operative Society. These were apparently household savings, and the husband was successful in claiming the money. Counsel for the wife—we are now getting into a more modern and familiar atmosphere—said that the keeping of a house was the occupation of a wife and that what she saved by her skill in that occupation belonged to her, and one would have thought that this was an idea eminently suitable to be considered under section 17 of the 1882 Act, even apart from the decision given under the Workmen's Compensation Act[22] to which the court was referred and which is discussed below. The commentator in the *All England Reports* thought the point had really been settled by previous authority, but that "some little doubt" had been felt whether the position had been "affected by social change and the various statutes dealing with the property of married women." But if such doubts were felt by the members of the court, the reporter did not think it worth while to convey to us their expression. The judgments cover half a page (in the admittedly very small war-time print of the All E.R.). Scott L.J. said there was "no justification at all for the contention that, where a husband hands to his wife an allowance for housekeeping purposes, the husband is to be taken *as a matter of law*[23] as presenting the savings out of that money to the wife *for her sole use*."[23] With this one can only respectfully agree. Whether there is an intention to give or an intention to lend is not a "matter of

[21] [1943] 2 All E.R. 579.
[22] *Montgomery* v. *Blows* [1916] 1 K.B. 899. It is very doubtful whether this decision really supported the argument.
[23] Writer's italics.

law," but a question of fact, and the problem is what inference as to their intention the court will draw from the conduct of the spouses. Nor does this inference have to be an "all or nothing," *i.e.*, there is a *via media* between finding that the household savings were intended for the "sole use" of the husband or for that of the wife, and such a *via media* is not blocked to the court where it acts under section 17. Scott L.J. realised that "the position in law will no doubt depend upon the evidence of what has passed between the parties," but, as is usual in such cases, "nothing was said at all" and there was no arrangement by which the husband made a gift to her. This, one would have thought, would hardly occur to 99 out of 100 married couples, but, if it does not occur to them, according to Scott L.J., the result is that the savings remain the property of the husband. The fact that this money came out of the husband's weekly allowance to the wife "was sufficient in the absence of any evidence to the contrary that this money was still the property of the husband." This judgment is the more astonishing because it came from Scott L.J. who, only five years previously,[24] had so vigorously denounced the outmoded fictions of the common law and emphasised the sweeping character of the 1935 Act. Luxmoore L.J. merely said that the husband's right to the wife's household savings was "clear law," but Goddard L.J. (as he then was) tried to supply a rationale. "Even if there had been an arrangement between the husband and the wife with regard to those savings, I am far from saying that this sort of domestic arrangement can necessarily result in a legal contract," an implicit reference, no doubt, to *Balfour* v. *Balfour*.[25] But it is not, with respect, a question of a "contract," but one concerning a transfer of property, and, in postulating the need for an "arrangement," one begs the question as to what is the position if there is no arrangement at all. Goddard L.J. took it for granted that, as a matter of law, in such a situation the money was the husband's.

It will have been noted that in none of these decisions was any attempt made to justify the rule with the principles of the law of agency, and the dictum of Goddard L.J., which has just been quoted, would appear to deprecate the introduction of such principles into the express or implicit "domestic arrangements" between husband and wife. Nor did the law of trusts and the principles of equity about the presumption of advancement and its refutation come into the picture at all. They did so, however, in the last and most important of these cases, which was the decision of the Court of Appeal in the well-known "football pool case," *Hoddinott* v. *Hoddinott*.[26]

[24] *Barber* v. *Pigden* [1937] 1 K.B. 664, at p. 678.
[25] [1919] 2 K.B. 571.
[26] [1949] 2 K.B. 406.

The spouses were married in 1934. The husband gave his wife a housekeeping allowance out of the £8 a week he was earning, she had no means of her own and was not gainfully employed. They amused themselves by filling in football pool coupons, taking the stake money out of that part of the housekeeping allowance which the wife had saved. They played the game of forecasting results together, although the coupons were always in the husband's name. Whatever skill may be required for this pastime was contributed by both. The cheques for the prizes they got were always made out to the order of the husband; on one occasion the wife made a correct forecast and used the 11s. she won for the buying of a table-cloth. In March, 1936, the couple were, on two occasions in one week, unusually lucky or unusually skilful. In two different competitions they secured one prize of £5 18s. and another of £138 7s. The husband paid the cheque for £144 5s. (which was to his order) into a bank account opened in their joint names.[27] This was done on the suggestion of the bank clerk in order to enable the wife to draw against the account, the husband normally being at work during the bank's business hours. He gave his wife the amount of £5 18s. on the ground that the forecast for which that prize had been won had been hers, gave £5 to his and the same amount to her mother, and used £17 to pay off some hire-purchase moneys for articles in their possession. Each of them used some money for buying clothes, and the wife also drew some small amounts for household expenses, and with the balance (the bulk of the money) they paid the rent for their hire-purchase furniture until it was paid off. In 1947 they quarrelled and separated, both claimed the furniture and the husband won. The Court of Appeal was divided: Bucknill and Cohen L.JJ. holding that the husband was entitled to the entire furniture, and Denning L.J. dissenting, taking the view that it should be treated as the joint property of husband and wife. The case goes to the root of the problems discussed in this article.

The first and most fundamental problem in this case was (as it should have been in *Birkett* v. *Birkett* and in *Blackwell* v. *Blackwell*) how far the court ought to apply strict rules of law. Bucknill and Cohen L.JJ. took it for granted that it should, but Denning L.J.[28] mentioned that under section 17 the court has a judicial discretion, "but, of course, this discretion has to be exercised according to the principles of law." Now, with respect, the meaning of these words is not entirely clear. If they mean that the discretion must not be exercised arbitrarily, they would seem to involve a tautology because judicial discretion is by definition the opposite of arbitrariness. If they are intended to say that legal

[27] It was not clear whether the account was a joint account or an account in the husband's name with an arrangement that the wife could draw against it. See *per* Cohen L.J. at p. 413.

[28] At p. 415.

principles governing the acquisition and transfer of property must be applied between the spouses, then, it is submitted, the statement involves a contradiction, because exercising a discretion and applying strict rules of law are opposites. The wife had applied to the county court for the delivery of furniture which, she alleged, had been purchased out of her money, and she had founded her application on section 17 of the 1882 Act, under which the judge "may make such order with respect to the property in dispute . . . as he thinks fit." The statute does not say that he may make an order where he thinks fit to do so, but such order as he thinks fit, *i.e.*, the discretion refers to the substance of the order, not to the question whether it is to be made at all. Cohen L.J. (as he then was) said at the beginning of his judgment [29]: "The temptation to give a Solomon's judgment in this case is great, but the learned judge resisted it, . . ." an attitude which was approved and shared by the majority of the Court of Appeal. It is, however, submitted that it is not only the right of the court but that it may be its duty, when acting under section 17, to "give a Solomon's judgment," *i.e.*, to use its discretion without allowing it to be hampered by questions of legal title. It is difficult to see what meaning can be attached to the words in section 17 quoted above if it is not that the judge is not bound by the rigid rules of property law. One is tempted to feel that, in matters concerning property, judges are sometimes afraid of exercising discretion. Perhaps they are occasionally too reminiscent of their days at the Bar and too accommodating to the sentiments of advocates who, quite understandably, hanker after that unattainable ideal of legal "certainty" which permits them to give clear answers to clients. Where magistrates or administrative authorities fetter the discretion they are liable to exercise, the courts know how to compel them not to stereotype that which the law wants to remain changeable and not to introduce extraneous rigidities into the flexible exercise of their powers.[30] But is not this the very thing the courts themselves do all too frequently? And is this not an example demonstrating the evil consequences which arise when the spirit of positivism and the worship of technicalities invades the administration of the law? To apply to household property and to household savings the cast iron categories of property law means to use a set of rules designed to govern the relation between strangers for the regulation of a human relationship for which they are not fitted. Section 17 was intended to prevent this, but, by their practice, the courts have, to a large extent, nullified the beneficial effect it might have had. *Hoddinott* v. *Hoddinott* shows this perhaps more plainly than any other reported case, but the practice of applying strict legal principles to questions of property arising under section 17 is of long

[29] At p. 412.
[30] *Sharp* v. *Wakefield* [1891] A.C. 173, at p. 180 (Lord Halsbury); *R.* v. *L.C.C., ex p. Corrie* [1918] 1 K.B. 68.

standing and not confined to household savings.[31] Thus, in *Kelner* v. *Kelner*,[32] Sir Boyd Merriman P. said that, under section 17, " after whatever inquiries the court may think it necessary to make the question remains: whose property is this? Is it the husband's or the wife's or does it belong to them both jointly?," and he added that, in this respect, the procedure was wholly different from that for the variation of settlements under what is now section 25 of the Matrimonial Causes Act, 1950. But in this case the application of strict property rules led to a situation which both the Registrar and the President who affirmed his order regretted and which, in the circumstances, was the sort of unjust result section 17 was, it is submitted, designed to prevent. Yet other cases show that the courts are quite prepared to override the strict letter of the law of property. A compelling reason for doing so was given by Lord Goddard in *Hichens* v. *Hichens* [33]: " As everybody knows, it is often difficult to decide questions of property between husband and wife according to their strict rights," and as an illustration of this difficulty Lord Goddard mentioned the case of wedding presents. That it is, however, not only the difficulty the courts find in disentangling the property rights of the spouses which justifies a decision *ex aequo et bono* is shown by some of the cases on the matrimonial home, where, exercising their discretionary powers under section 17, the courts came to the rescue of a deserted wife although the strict letter of the law of property would have clearly defeated her claim.[34] If it is argued that such discretionary powers are confined to cases in which the property is indivisible (such as wedding presents and the matrimonial home) and that (as perhaps indicated by Lord Goddard in *Hichens* v. *Hichens* [35]) the rationale of the discretion vested in the court can only be found in the difficulties attending the equitable distribution of such indivisible assets, the answer must be that no such limitation can be gathered from the Act itself. The basis of the judicial discretion, it is submitted, is not the nature of the property because if it was, the discretion should also extend to the cases of other persons sharing a common household, *e.g.*, brother and sister or father and son. The true basis is the matrimonial relationship and its peculiar and unique character. Even if this is wrong, however, it must be remembered that in *Hoddinott* v. *Hoddinott* the property claimed by the wife was not a divisible savings account but furniture, *i.e.*, a type of assets to which Lord Goddard's

[31] See, *e.g.*, *Wood* v. *Wood and White* (1889) 14 P.D. 157.

[32] [1939] 3 All E.R. 957, at p. 958. In *Joseph* v. *Joseph* [1909] P. 217, at p. 218, the registrar had suggested that this was " in principle akin to an application for the variation of settlements."

[33] [1945] 1 All E.R. 451, at p. 453.

[34] See, *e.g.*, *Hutchinson* v. *Hutchinson* [1947] 2 All E.R. 793.

[35] *Supra.* Lord Goddard seemed to think that there was a difference between the exercise of the discretion with regard to matters such as wedding presents and " the title, for instance, to money at the bank."

observation in *Hichens* v. *Hichens* and the underlying reason of the matrimonial home cases were fully and literally applicable. It is indeed impossible to see why what should be true of wedding presents should not be equally true of furniture acquired by means of money which originated in a prize for joint gambling in the football pools.[35*]

Secondly, however, if *Hoddinott* v. *Hoddinott* had to be decided according to strict rules of property law, the next question was how the acquisition of ownership was to be determined. What was the decisive element, the origin of the stake money or the skill which secured the winning of the prize? The stake money came out of household savings, *i.e.*, out of the husband's earnings, but the skill was contributed by both spouses. This is an ancient question,[36] not restricted to the law of husband and wife:

> "Si quis in aliena tabula pinxerit, quidam putant tabulam picturae cedere: aliis videtur picturam, qualiscumque sit, tabulae cedere, sed nobis videtur melius esse tabulam picturae cedere: ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere."

As Denning L.J. pointed out, the stake money was insignificant compared with the skill they both contributed, and no more important than would have been the paper of a manuscript for a book they had written together. The legal dispute whether the picture belonged to the painter or to the owner of the wooden board on which it was painted was in substance identical with the difference of opinion in the Court of Appeal, but Justinian would have rejected the very materialistic view which commended itself to the majority of the court. If the skill in selecting the winning teams was the decisive element, the conclusion drawn by Denning L.J. became inevitable: "If husband and wife together embark on a joint venture in which they equally contribute their skill, then if nothing is said between them, the proper inference is that the proceeds go to them jointly."[37]

[35*] For the traditional attitude towards s. 17 see also the judgment of Somervell L.J. in *Lee* v. *Lee* [1952] 1 All E.R. 1299. The decision of the Court of Appeal in *Re Rogers' Question* [1948] 1 All E.R. 328, and that of Vaisey J. in *Jones* v. *Maynard* [1951] 1 All E.R. 802, are based on the principle that effect must be given to the presumable intention of the parties. The latter case did not arise under s. 17, but the issue was similar. The learned judge acted on the "assumption of half and half" in dividing a joint account of husband and wife, irrespective of how much money had been paid into or taken out of the account by either.—This decision was approved by the Court of Appeal in the very important case of *Rimmer* v. *Rimmer* [1952] 2 All E.R. 863, which was reported after this article had gone to press. In this case the Court of Appeal exercised its discretion under s. 17 so as to do justice between husband and wife. It divided the proceeds of the sale of the matrimonial home equally and irrespective of the amounts contributed by either spouse towards its acquisition.

[36] I. 2, 1, 34.

[37] [1949] 2 K.B. at p. 414.

This is a view which[38] is closely akin to that taken by the Insurance Commissioner where the wife has assisted the husband in his work and in doing so has done more than what was required by her "wifely duties."

Thirdly, on the assumption that it was the stake money which was the determining factor, we are back to the old problem: who owns the household savings? That the bank account was placed in the joint names of husband and wife (if it was so placed) was rightly, it is submitted, held to be irrelevant. In this respect the old case of *Marshal* v. *Crutwell*,[39] which Cohen L.J. quoted, was not only in point, but in a vital aspect, similar to the case before the court. In both cases the account was placed in the joint names of the spouses for the sake of convenience, *i.e.*, so as to enable the wife to draw against it, in the old case because the husband was in failing health, in the modern case because he was working. In such circumstances the presumption of advancement is rebutted, or, more correctly perhaps, the presumption of a resulting trust in favour of the husband is not rebutted by the counter-presumption of advancement in favour of the wife. As Jessel M.R. said: "You may take surrounding circumstances into consideration so as to say that it is a trust and not a gift." This, however, meant no more than that a trust in favour of the husband was not precluded by the account standing in the joint names of the spouses; it did not mean that there was a trust in his favour. Whether or not this was the case had to be decided in the light of the "surrounding circumstances." Bucknill L.J. went so far as to say that a resulting trust actually existed, but a resulting trust not for the benefit of the husband alone. "The money belonged to the husband and I should have thought that she held it in trust for keeping them both." Here, then, at last we find that an attempt is made to justify the rule about household savings which had been enunciated in the earlier cases discussed above. It is, to some extent, a reversal of the old rules of equity, under which the husband was the trustee of the wife's separate property. Now the

[38] In the law of social insurance this question arises in the form whether a married woman who helps her husband in his business is engaged in a gainful occupation or only discharging her wifely duties. The husband's right to obtain an increase of sickness benefit in respect of his wife may depend on this question. (National Insurance Act, 1946, s. 24 (1)). In C.S. 509/50 (Pamphlet S/25, p. 2) the National Insurance Commissioner held that a shopkeeper's wife who attended to the business during her husband's protracted illness and to whose activities a substantial part of the profits had to be attributed was "gainfully occupied," a view which is similar to that on the "joint venture" expressed by Denning L.J. Where, on the other hand, as in C.S.133/50 (Pamphlet S/7, p. 2), the wife took responsibility for the shop only during a comparatively short emergency while the husband was in hospital, she was held merely to have acted in discharge of her wifely duties. See also the recent case R(S) 46/52. For an explanation of the method of quoting Commissioners' decisions, see Part IV of this Article.

[39] (1875) L.R. 20 Eq. 328. Contrast *Re Young*; *Trye* v. *Sullivan* (1883) 28 Ch.D. 705.

wife is the trustee of the household money, but a trustee, be it noted, "for keeping them both."

It is permissible to express doubts whether the machinery of the law of trusts should be used in matters which fall within the scope of the specific remedies provided for domestic relations. Though the case is not strictly analogous, it is relevant to remember that, in *Stevens* v. *Tirard*,[40] the Court of Appeal held that where the husband under an order of a court pays to his wife money for the maintenance of a child, no trust is created in favour of the child. The remedy against a mother who fails to spend the money for the child is not to ask her for an account but to deprive her of the custody.[41] Maintenance money paid to the mother becomes part of what, in another branch of the law, is known as the "family fund"[42]; it is money to be used for keeping both mother and child, and to disentangle the family fund with the help of trust accounts would seem to be a singularly futile undertaking. But it is no less futile as between husband and wife than it is as between mother and child, at any rate where the funds are intended to maintain both parties.

If, however, the concept of the trust must be applied to this domestic relationship, what conclusion should be drawn from the the intention of the spouses to use the money so as to keep them both? Is it not money earmarked for their joint use? And, if it is, does it matter whether it is used at once or saved "against a rainy day," whether it is used for the acquisition of food for immediate consumption or of furniture for long term use? If, by denying to herself, and no doubt to her husband as well, some comforts and pleasures the wife seeks to make their old age or the future of their children more secure, does the money so saved cease to be destined for their joint purposes? And can the eventual end of the consortium, whether by death or by divorce or by separation, alter the "trusts," if trusts it must be, on which the wife has held the money? To these questions the judgments of the majority of the Court of Appeal gave no answers. It is submitted that the law as laid down in *Hoddinott* v. *Hoddinott* and in the earlier cases discussed above cannot only be attacked as an injustice to the wife whose industry and economy must have been at least as important for the accumulation of the money as the husband's earning power. It is also open to the reproach that it is inconsistent with the legal foundation on which the decision rested which was that of a trust for both spouses and not for the husband alone.

Both Bucknill and Cohen L.JJ. referred to *Balfour* v. *Balfour*,[43] the decision which drew a necessary inference from the typical

[40] [1940] 1 K.B. 204; see *per* Clauson L.J. at p. 214.
[41] See *per* Goddard L.J. [1940] 1 K.B. at p. 215.
[42] See below, Part IV of this Article.
[43] [1919] 2 K.B. 571.

conditions of domestic life by holding that the transactions between the spouses cannot be assumed to have been entered into with the intention of creating legal relations. A transfer of money from the husband to the wife for household purposes, it was thought, could not be construed as a " gift " in the legal sense without introducing legal categories into circumstances which they do not fit. But a trust is a legal institution no less than a gift, and an intention to create it no more compatible with the nature of the consortium than the intention to give or the intention to contract. *Balfour* v. *Balfour* was indeed most relevant to the decision, but it should have yielded the lesson that section 17 ought to be applied without making the attempt to cast the mutual dealings between the spouses into the mould of legal institutions, whether they be contract, gift or trust.

The principle of separation of property has its great merits. Where either spouse owns land or investments unconnected with the life of the household community, or where husband or wife owns a business or a share in a business, very much can be said for keeping the capital assets apart, no matter whether they were acquired before or during marriage. This was the rationale of the married women's property legislation which culminated in the Act of 1935. This legislation, however, should not have been applied to those portions of the spouses' income and to those capital assets which serve the life of the household community, nor would it have been so applied, had the courts succeeded in drawing the necessary factual inferences from the intentions of the parties. That intention, it is submitted, should, in the absence of evidence to the contrary, be regarded as directed to the creation of joint ownership in those assets which are, either immediately or in future, designed to serve the needs of the household. Legislation has been passed to give effect to the rights of the spouses in the law of succession.[44] It is hard to see why a similar idea should not also be applied during their lifetime. At present the undivided " family fund " is ignored in the law of husband and wife. It will be shown later that it is a living reality in the application of social legislation. As the law now stands, the statutes dealing with married women's property which were passed in order to create equality as between the married women of the privileged classes and those of the working and lower middle classes, have produced this equality only in a formal sense. The bulk of the property of the majority of married couples consists just of those " household assets," including savings, which the courts hold normally to be vested in the husband, and this means that statutes like the Act of 1935 have never

[44] Administration of Estates Act, 1925, s. 46 (1) (i). In the event of intestacy the " personal chattels " go to the surviving spouse. The definition of " personal chattels " in s. 55 (*x*) might be useful if, on any future occasion, special legislation on household property was contemplated. Contrast the definition in s. 4 of the Bills of Sale Act, 1878.

been allowed to produce either substanial equality between the well-to-do and the majority nor, among the latter, between husband and wife. It is not impossible for the courts to remedy this situation, although probably only a decision of the House of Lords could achieve this. Since this is perhaps not all too likely to happen, it is arguable that legislation would have to intervene. The task of the draftsman charged with the preparation of such legislation would be difficult, because he would have to formulate a criterion by which to distinguish " household assets " from others. Nevertheless, this task would be urgent, urgent in the interest of married women, but also in that of outside creditors. It is the position of the latter which will now have to be considered.

(*To be concluded*)

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WHEN IS A REPEAL NOT A REPEAL?

(1) Section 39 (1) of the Crown Proceedings Act, 1947,[1] provides that "The enactments set out in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule." The Second Schedule contains the following entry:—"23 and 24 Vict. c. 34. The Petitions of Right Act, 1860. The Whole Act."

(2) Section 15 of the Bills of Sale Act (1878) Amendment Act, 1882,[2] as originally enacted, provided inter alia that "The eighth and twentieth sections of the principal Act [the Bills of Sale Act, 1878[3]] . . . are repealed . . ."

The casual reader, indeed even the careful reader, of the Acts of 1882 and 1947 might well conclude that, as a result of the provisions set out above, sections 8 and 20 of the Bills of Sale Act, 1878,[3] and the whole of the Petitions of Right Act, 1860,[4] have been effectively repealed for all purposes and can be wholly disregarded in relation to events happening after the coming into force of the repealing enactments. A decision of Fry J. in 1883 (to be discussed in detail later) shows that this view is wrong as regards section 20 of the Bills of Sale Act—the learned judge held that the section has not in fact been repealed for all purposes—and it will be submitted in the course of this article that the view is also wrong as regards the Petitions of Right Act. The two instances demonstrate clearly the need for great care in the interpretation of repeal provisions. These provisions may be, and often are, traps for the unwary, and it is the purpose of this article to describe the approach to them which, in the writer's opinion, must be adopted if error is to be avoided. The task involves, first, an examination of the technique of the modern parliamentary draftsman in the matter of repeals and, secondly, a review of the attitude of the courts to that particular part of his handiwork. In the final section of this article it is proposed to test the results obtained from that examination and review by reference to the repeal provisions set out at (1) and (2) above.

Repeal Technique of the Parliamentary Draftsman

The Railway and Canal Commission (Abolition) Act, 1949,[5] which received the Royal Assent on March 9, 1949, will serve as an example. The main purpose of the Act was to abolish the Railway and Canal Commission and transfer its few remaining functions

[1] 10 & 11 Geo. 6, c. 44.
[2] 45 & 46 Vict. c. 43.
[3] 41 & 42 Vict. c. 31.
[4] 23 & 24 Vict. c. 34.
[5] 12 & 13 Geo. 6, c. 11.

to various other tribunals. Most of those functions are, under section 1 of the Act, transferred to the High Court, but certain functions under the Telegraph Acts [6] and the Defence of the Realm (Acquisition of Land) Act, 1916,[7] go to other tribunals. Having regard to section 5 of the Act of 1949, we can assume that the draftsman was instructed to abolish the special right of water consumers and local authorities, under section 1 of the Metropolis Water Act, 1897,[8] to take proceedings before the Commission against the Metropolitan Water Board for breaches of the Board's statutory duties. Let us take a seat at the draftsman's elbow and see how he deals with the matter. Giving effect to the instruction clearly involves the repeal of section 1 of the Act of 1897, but observe that the draftsman does not merely add the section to his repeal schedule and say no more about it. He inserts in the body of his Bill (see section 5 of the Act) a clause which expressly provides that section 1 of the Act of 1897 is to cease to have effect: he then adds the section to the list of repealed enactments set out in the schedule. The reason for his adopting this apparently roundabout method is succinctly explained in a note in *Halsbury's Laws of England* [9] under the heading "Drafting of Statutes": "Repeals which are consequential on the proposed Bill may be scheduled only. But those which raise a point of substance should be brought to the attention of Parliament by insertion in a clause."

It will be remembered that the common form repeal provision employed to bring a schedule of repeals into force, gives no clue as to the previous effect of the enactments repealed or the reasons for those repeals. See, for example, the extracts from the Crown Proceedings Act quoted at (1) above. Under normal parliamentary procedure the schedule itself is passed as a whole without a detailed scrutiny. Where, therefore, the common form provision and the repeal schedule are used, a member of Parliament, unless he undertakes the necessary detailed research, is quite in the dark as to which parts of the existing law are being done away with by the schedule.

It was not a necessary consequence of the abolition of the Railway and Canal Commission and the transfer of its functions that the right to take proceedings under section 1 of the Metropolis Water Act, 1897,[10] should be abolished. It was a quite separate alteration of law. Therefore, had the draftsman simply put the section in the general schedule of repeals, he would have been attempting (the word is used advisedly as will later appear) to work a substantial change of law by a mere entry in a repeal

[6] 26 & 27 Vict. c. 112. 41 & 42 Vict. c. 76.
[7] 6 & 7 Geo. 5, c. 63.
[8] 60 & 61 Vict. c. 56.
[9] 2nd (Hailsham) ed., Vol. 31, p. 571, note (r).
[10] 60 & 61 Vict. c. 56.

schedule. That change of law would certainly not have been obvious to the members of Parliament who were asked to pass the Bill and would have come as a surprise to any person reading the measure as an Act. By using a special clause to effect his purpose, the draftsman made it clear that the repeal was one of the substantive provisions of his Bill and, at the same time, ensured that it would be open to detailed scrutiny at the Committee stage of the Bill. Compare the repeal of section 1 of the Metropolis Water Act with the repeal of sections 2 to 5 of the Railway and Canal Traffic Act, 1888,[11] which is also provided for in the Act of 1949. Those sections of the Act of 1888 established the Railway and Canal Commission and clearly had to be repealed on its abolition. Their repeal, however, did not necessitate a special clause, since a member of Parliament who assents to a provision abolishing the Commission must be taken to assent to the repeal of the existing enactments which set it up. He can have no grounds for complaint if the repeal is carried out by means of general words in the body of the Bill together with an entry in a repeal schedule—a schedule which only gives the regnal years and short titles, but no explanation of the effect, of the enactments listed in it.

It will be seen that the proper mode of repeal of an enactment —special clause or general words plus an entry in a repeal schedule —is a matter of considerable importance from the constitutional point of view. If the draftsman and the department responsible for a Bill are not scrupulously careful a change of law may be brought about without the real consent of Parliament. Furtive attempts to alter the law are not unknown (the question arose in Parliament in acute form on the Post Office Consolidation Bill, 1897[12]) but must be rare; and no doubt the fear of incurring the terrible wrath of Parliament would act as a powerful deterrent on even the boldest minister. A heavy responsibility, therefore, rests upon the draftsman who must have the existing law at his finger tips and know the exact effect that his Bill will have upon it. An examination of the statute book will reveal that parliamentary draftsmen tend to be very cautious in the matter of repeals, and, where there is any doubt as to a repeal being consequential upon a substantive provision in the body of the Act, they insert a special clause bringing the repeal to the notice of Parliament. For example, section 45 (1) of the Representation of the People Act, 1948,[13] rendered void the election of a candidate at a parliamentary or local government election if he had engaged as his canvasser or agent a person who, to his knowledge, was subject to an incapacity to vote at the election.

[11] 51 & 52 Vict. c. 25.
[12] Parl.Deb., 4th Series, Vol. XLIX Cols. 221 *et seq.* The Post Office came in for some severe criticism and the Bill was subsequently withdrawn.
[13] 11 & 12 Geo. 6, c. 65.

Section 44 of the Parliamentary Elections Act, 1868,[14] had made similar provision as respects parliamentary elections and (one would surmise) could quite properly have been removed from the statute book by an unobtrusive entry in the general repeal schedule. The draftsman did not, however, adopt this course. He added a subsection (3) to his section 45 expressly declaring that section 44 of the Act of 1868 was to cease to have effect: he then formally repealed section 44 in the general repeal schedule. The latter repeal, being directly consequential upon section 45 (3) of the Act, was unobjectionable. (In this connection it is worth noting that the "cease to have effect" provision may not be quite the same thing as a straight repeal since it may not bring into play the elaborate savings contained in section 38 of the Interpretation Act, 1889.[15]) A variation of the technique just described is sometimes used. Not being satisfied with a subsection which merely declares that an earlier enactment is to cease to have effect, the draftsman may go the length of incorporating a subsection which actually repeals the earlier enactment. Then, to make assurance doubly sure, he repeats the operation in the general repeal schedule. For an example of this, see the Superannuation Act, 1949.[16] Section 39 (6) expressly repeals section 4 of the Superannuation Act, 1887,[17] and section 3 of the Superannuation Act, 1914,[18] those sections having dealt with matters for which fresh provision is made in subsections (1) to (5) of section 39 of the Act of 1949. The earlier enactments are also included in the general repeal schedule to which effect is given by section 64 (2) of the Act of 1949. The explanation of double repeals such as this probably is that the draftsman wishes to facilitate the task of the reader by gathering up all the repeals in one schedule at the end of the Act. He certainly cannot be accused of furtive tactics.

To sum up. Under modern drafting practice the repeal schedule is not an independent part of an Act of Parliament. It is linked directly with the substantive provisions and will only contain repeals which are consequential on those provisions. The consequential nature of the repeal of any enactment may be due either to the fact that the enactment is repugnant to or inconsistent with one or more of the substantive provisions of the repealing Act, or to the fact that one of those substantive provisions expressly nullifies the enactment in question.

[14] 31 & 32 Vict. c. 125.
[15] 52 & 53 Vict. c. 63. As to the scope of s. 38 of this Act, see *Wicks* v. *Director of Public Prosecutions* [1947] A.C. 362, at 366.
[16] 12 & 13 Geo. 6, c. 44.
[17] 50 & 51 Vict. c. 67.
[18] 4 & 5 Geo. 5, c. 86.

Attitude of the Courts to Repeal Provisions

The attitude of the courts to repeal provisions must now be considered. There is an almost complete lack of authority but *Hough* v. *Windus* [19] is an instructive case which is treated in *Craies on Statute Law* [20] as expressing the general rule on the point.[20*] The facts were that the plaintiff Hough, a judgment creditor of the defendant, issued on December 20, 1883, a writ of elegit against the defendant's goods under the statute of Westminster the Second (13 Edw. 1, c. 18). On December 22, 1883, the sheriff entered and took possession of the goods but delivery of them to the plaintiff was not made before January 1, 1884, when the Bankruptcy Act, 1883,[21] came into operation. Section 146 (1) of that Act provided that "The sheriff shall not under a writ of elegit deliver the goods of a debtor nor shall a writ of elegit extend to goods." Section 169 and the Fifth Schedule repealed inter alia so much of the 13 Edw. 1, c. 18 as related to the chattels of a debtor. There were savings attached to the repeal provision similar to those now found in section 38 of the Interpretation Act. The question was whether the provisions of the Bankruptcy Act prevented the plaintiff from obtaining delivery of the goods. The Court of Appeal, reversing the decision of the Queen's Bench Division, held that the Act of 1883 did not bar the plaintiff's remedy since it could not be clearly gathered from the wording of the statute that there was an intention to interfere with existing rights. One argument addressed to the court on behalf of the defendant must be set out here since Bowen L.J.'s answer to it goes to the very heart of the question of the nature and function of an express repeal. It was argued for the defendant that, since the effect of the repeal of the relevant part of 13 Edw. 1, c. 18 would be to prevent any delivery of goods under an elegit after January 1, 1884, section 146 of the Act would have no effect at all unless it were held to apply to cases where execution had begun, but had not been perfected by delivery, before that date. At page 235 of the report Bowen L.J. deals with the argument in the following words. "It appears to me that the answer to this somewhat formidable argument is to be found in a study of the framework of the Bankruptcy Act, 1883,[22] so far as it works a repeal of previous legislation. It does not seem to me to be possible, *without misunderstanding the scheme of drafting which the legislature has adopted*,[22*] to treat the repealing section 169 as an independent section, or one intended to do more than for sake

[19] (1884) 12 Q.B.D. 224.
[20] 4th Ed., p. 299.
[20*] For a recent case in which repeals were carefully analysed, see *Smith* v. *London Transport Executive* [1949] 1 Ch. 685, especially the judgments of the Master of the Rolls and Somervell L.J.
[21] 46 & 47 Vict. c. 52.
[22] 46 & 47 Vict. c. 52.
[22*] The writer's italics.

of symmetry to repeal expressly in a group those portions of previous statutes which had already been repealed by implication in the body of the Act. I have examined Schedule 5 in detail, which contains the list of previous Acts of Parliament, all or part of which is to be repealed by section 169, and I have come to the conclusion that the idea upon which the Bankruptcy Act, 1883,[22] has been framed was to enact in the first place specifically a complete code of provisions which, so far as they are inconsistent with any previous legislation, would repeal it by implication, and then over again, at the very last, to clear the statute book, so to speak, by section 169, and to sweep into one compendious repeal section all the statutes, and sections of statutes, which in the earlier part of the Act had been impliedly done away with already, the Bankruptcy Act, 1869,[23] itself being among the number. The mere fact therefore that an express repeal of certain provisions as to elegit is contained in this general clause would not be any longer an argument for putting on the earlier sections of the Bankruptcy Act, 1883,[24] any construction which they would not independently demand. It seems to me, so far as I have been able to judge, that this observation applies equally to all the Acts and parts of Acts mentioned in Schedule 5. The sweeping repeal of each in express terms has already in all cases been preceded in the body of the Bankruptcy Act, 1883,[24] by special enactments as to the individual subject-matter which would work an implied repeal to the same extent as that afterwards expressly enacted." Cotton L.J. agreed with Bowen L.J. in the latter's analysis of the repeal provisions. See page 238 of the report.[24*]

Consideration of Repeal Provisions at (1) and (2) above

(1) *Repeal of the Petitions of Right Act by the Crown Proceedings Act.*

If the Crown Proceedings Act, 1947,[25] is examined it will be found that "the scheme of drafting" (to use Bowen L.J.'s phrase) is the same as that adopted in the Bankruptcy Act[25*] considered in *Hough* v. *Windus*.[26] The body of the 1947 Act contains the new substantive provisions and Schedule 2, the repeal schedule, excises all the old law that has, in consequence, been superseded. Let us now examine the repeal of the Petitions of Right Act, 1860,[27] which

[22] 32 & 33 Vict. c. 71.
[24] 46 & 47 Vict. c. 52.
[24*] It would seem that Bowen L.J.'s mode of construing the repeal provisions in *Hough* v. *Windus* is simply an application of a broad principle of statutory construction which requires the interpreter to have regard to the "method of legislation"—as Lord Herschell put it in *Institute of Patent Agents* v. *Lockwood* [1894] A.C. 347 at 357.
[25] 10 & 11 Geo. 6, c. 44.
[25*] And, in the writer's opinion, in all other modern Acts of the Imperial Parliament.
[26] (1884) 12 Q.B.D. 224.
[27] 23 & 24 Vict. c. 34.

that Schedule contains. At first sight it appears to be a total repeal, but if we turn to section 40 (1) of the Act we find : " Nothing in this Act shall apply to proceedings by or against, or authorise proceedings in tort to be brought against, His Majesty in his private capacity. . ." Thus no substantive provision is made in the body of the Act as respects the Sovereign in his private capacity. If the Petitions of Right Act were held to be totally repealed, it would be tantamount to giving the repeal schedule an independent operation which, according to Bowen L.J., and to the results of the examination carried out in the earlier part of this article, it is not intended to have. There is a further reason for holding that the Act of 1860 is not repealed as respects proceedings against the Sovereign in his private capacity. The opening words of section 40 (1) quoted above of the Act of 1947 are " Nothing in this Act shall apply to . . ." These are clearly wide enough to include the repeal schedule as well as the provisions in the body of the Act. The result is that the repeal of the Act of 1860 does not apply as respects proceedings against the Sovereign in his private capacity. On page 8 of his excellent book on *Crown Proceedings*, Dr. Glanville Williams expresses surprise that the Crown Proceedings Act should have totally repealed the Petitions of Right Act, and goes on to contend that proceedings against the Sovereign in his private capacity are now governed by the unreformed pre-1860 rules of the Petition of Right. For reasons which have already been sufficiently stated I would respectfully disagree with this contention. In a footnote, the learned author says that the question of the total repeal of the Petitions of Right Act was taken up in Parliament with those responsible for the Bill, but adds that the argument (that the Act of 1860 was totally repealed) was apparently thought to be without foundation for no amendment was made. The writer's guess is that the draftsman disposed of the argument by pointing to the clause which eventually became section 40 (1) of the Act.

(2) *Repeal of section* 20 *of the Bills of Sale Act*, 1878, *by the Amendment Act of* 1882.

This repeal, which came before the court in *Swift* v. *Pannel*,[28] took a rather unusual form. So far in this article we have been considering instances in which the draftsman used the device of the repeal schedule. It sometimes happens, of course, that there is not sufficient material to justify a separate schedule and so even the *consequential* repeals are effected by a section in the body of the Act. Section 15 of the Act of 1882 is an example of this technique. The facts in *Swift* v. *Pannel*[29] were as follows : X transferred some chattels absolutely to Pannel, the plaintiff, by a bill of sale

[28] (1883) 24 Ch. D. 210.
[29] (1883) 24 Ch.D. 210.

which was duly registered. The transferor X being bankrupt, Pannel sued for an injunction against Swift, the trustee in bankruptcy, who was proposing to sell the chattels on the ground that they were in the order and disposition of the bankrupt. Section 20 of the Bills of Sale Act, 1878,[30] enacted that chattels comprised in a registered bill of sale should not be deemed to be in the order and disposition of the grantor within the Bankruptcy Act.[31] Section 15 of the Bills of Sale Act (1878) Amendment Act, 1882,[32] provided that "The eighth and twentieth sections of the principal Act [the Act of 1878] and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act." The question was whether section 20 had been totally repealed, or whether it was still partly in force. Prima facie the repeal is unqualified. Fry J., however, pointed out that the substantive provisions of the Act of 1882 did not apply to bills of sale given otherwise than by way of security for the payment of money. (Section 3 provides :—"The expression 'bill of sale' and other expressions in this Act have the same meanings as in the principal Act except as to bills of sale or other documents mentioned in section 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last mentioned bills of sale and other documents this Act shall not apply".) The learned judge held that section 20 of the Act of 1878 was still in force as respects bills of sale given by way of absolute transfer and, accordingly, found for the plaintiff.[33] The following is an extract from Fry J.'s judgment. "It appears to me therefore that the scope of that section [section 3 of the Act of 1882] is to leave entirely unaffected by the present Act [the Act of 1882] any bill of sale by way of absolute transfer, and to regulate one set of bills, namely, those by way of security, by the Act of 1882, and to regulate the other set of bills of sale, namely, those by way of absolute transfer, by the Act of 1878. Then section 15 [of the Act of 1882] is in these terms 'The eighth and twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act, are repealed . . .' It is plain that no enactment in the principal Act which relates to absolute bills of sale can be inconsistent with this Act [the Act of 1882] because this Act relates only to bills of sale by way of security, but no doubt the words are 'the eighth and twentieth sections of the principal Act shall be repealed' and that would be a plain repeal but for the words of the third section

30 41 & 42 Vict. c. 31.
31 32 & 33 Vict. c. 71.
32 45 & 46 Vict. c. 43.
33 N.B. The names of the parties are mixed up on page 210 of the report but the confusion is sorted out by the errata slip at the front of the volume.

which appear to me to confine the whole operation of the Act to bills of sale by way of security."

In construing the repeal provision by reference to the substantive provisions Fry J. was applying the principle which Bowen L.J. enunciated in *Hough* v. *Windus*[34] and which is the only principle consistent with the scheme of drafting adopted by the draftsmen of the statutes. The repeals effected by the Act of 1882, though they appeared in the body of the Act, were obviously consequential repeals, and to have treated them as independent substantive enactments would undoubtedly have defeated the intention of Parliament.

The moral of the story seems to be that substantive repeals effected by specific provisions in the body of an Act—an example is to be found in section 5 of the Railway and Canal Commission (Abolition) Act, 1949[35]—can usually be taken at their face value: consequential repeals—normally effected by general words in the body of the Act plus a repealed schedule—are worth watching.

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[34] (1884) 12 Q.B.D. 224.
[35] 12 & 13 Geo. 6, c. 11.
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STATUTES

Visiting Forces Act, 1952

Political expediency has frequently been held responsible for the fathering of undesirable legislative offspring. The latest statute to arouse doubts as to its desirability is the Visiting Forces Act, 1952, which may well be said to be the progeny of international expediency, for the purpose of the Act is to enable the United Kingdom to ratify the Agreement regarding the Status of Forces of Parties to the North Atlantic Treaty (Cmd. 8279) which was signed in June, 1951. Broadly speaking, the effect of the present statute is to provide for the creation in this country of a large body of persons who are not subject to the jurisdiction of the criminal courts. This, to say the least, constitutes a startling departure from the traditional principle which ordains that all persons, nationals and aliens, who commit a crime against the laws of this country are triable by the English courts.

The development of this ouster of jurisdiction of the criminal courts has an interesting background which needs to be stated if a proper appreciation is to be gained of the recent enactment. The story begins in 1933 when the Visiting Forces (British Commonwealth) Act was passed to legalise the setting up of service courts of Commonwealth forces stationed in the United Kingdom, but the jurisdiction of such courts was limited to "matters concerning discipline and the internal administration of such forces." Another step was taken with the enactment of the Allied Forces Act, 1940, which merely extended the 1933 Act to allied forces generally who were in this country. To prevent any doubts arising as to the extent of the jurisdiction exercisable by these military courts, the 1940 Act expressly provided that no restriction was being placed on the jurisdiction of the civil courts to try a member of any Allied armed force for an offence against the laws of this country. A similar provision was inserted in the Allied Powers (Maritime Courts) Act, 1941, which permitted the establishment in the United Kingdom of Maritime Courts for the trial of non-British subjects charged with certain criminal offences against the law of an Allied Power. In each of these three statutes, it will be observed, no question arose of ousting the jurisdiction of the English criminal courts.

However, within less than a year Parliament had passed the United States of America (Visiting Forces) Act, 1942, which, according to the Agreement entered into between the two countries and annexed as a Schedule to the Act, was to apply only "during the continuance of the conflict against our common enemies." Under this revolutionary enactment, United States service courts

were given the right to exercise exclusive jurisdiction in respect of any criminal offence committed in the United Kingdom by members of the American Armed Forces. This constituted a total ouster of jurisdiction of the English courts who could try an American soldier only at the request of the United States authorities. A notable instance in which this occurred was the case of *R.* v. *Hulton and Jones* (the "Cleft Chin" murder), referred to in *R.* v. *Jarmain* [1946] 1 K.B. 74.

If it be any consolation, the Visiting Forces Act, 1952, marks a limited withdrawal from the position created by the United States (Visiting Forces) Act, 1942, which, together with the Allied Forces Act, 1940, will be repealed on the coming into force of the present statute. The 1952 enactment is intended to cover not only the visiting armed forces of North Atlantic Treaty countries but also forces from Commonwealth countries who are stationed in any part of the United Kingdom. Service courts of these countries are authorised, under section 2, to exercise within the United Kingdom all the jurisdiction which their own law gives them over members of their armed forces and other persons subject to their service law, including the civilian component of the visiting force. The one limitation on the exercise of this power concerns the death penalty which, the Act provides, may not be carried out in this country unless the accused was convicted of an offence for which, under English law, he would also be liable to be sentenced to death.[1]

The real kernel of the statute is to be found in section 3 which lays down certain conditions which, if proved by a member of the visiting force or a civilian component who is charged in an English court with an offence against our law, entitle the accused to plead successfully that the jurisdiction of the court is excluded. This plea may be raised at any stage before the conclusion of the trial, but unless objection is in fact made to the competency of the court the question of ouster does not arise. The first instance of ouster of jurisdiction concerns offences committed in the course of duty, it being provided that a certificate to that effect by the appropriate military authority "shall be deemed sufficient evidence of the fact unless the contrary is proved." Secondly, ouster may ensue in relation to offences against the person which involve a fellow member of the force or a civilian component or a dependant, a term which includes the wife or child or any other person maintained by, or in

[1] Only four capital offences remain in English law: murder, treason, piracy with violence, and setting fire to H.M.'s ships. It is interesting to compare the position under the American Uniform Code of Military Justice, 1950, which revised and consolidated the Articles of War and the Articles for the Government of the Navy. Excepting those offences peculiar to military service, the only offences which may be punished with death under the Code are: sedition (Article 94), rape (Article 120), and unlawfully killing a human being (1) with a premeditated design to kill, or (2) when engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery or aggravated arson (Article 118).

the custody or care of, a member of the visiting force. The extent of this second heading may be gauged from the Schedule to the Act which enumerates the offences falling within this category—they include murder, manslaughter, infanticide, rape, buggery and assault, incest, wounding, causing grievous bodily harm and robbery. Finally, a plea of ouster will succeed if the offence is against the property of either the visiting force or of any of its members, military or civilian, which category includes such crimes as larceny, false pretences, embezzlement, malicious damage, arson, burglary and housebreaking.

This is certainly a formidable list but there exists a provision, similar to that introduced into the United States of America (Visiting Forces) Act, 1942, which enables the appropriate authority of the visiting force concerned to waive jurisdiction. Assuming the right to try its own members is not waived and that the accused is tried by court-martial, an English court cannot subsequently proceed to try the individual concerned for the same crime. However, no bar exists preventing an English court from trying the prisoner for a different crime which is based to some extent on the same circumstances for which he has previously been sentenced by the service court, but that sentence must be taken into consideration by the United Kingdom court when deciding what punishment to award.

An innovation, without parallel in any of the earlier enactments, is the provision under section 7 which forbids a coroner, unless otherwise directed by the Home Secretary, from holding or continuing an inquest if he is satisfied that the deceased person was either a member or a civilian component of a visiting force, or even a dependant in the sense described above. The same prohibition applies if a coroner becomes aware that a person, subject to the jurisdiction of the service courts, has been arrested or charged before a military court with the murder, manslaughter or infanticide of the deceased person. To this latter extent the Act merely follows the already existing practice laid down in the Coroners (Amendment) Act, 1926, s. 20.

Most of the remaining provisions follow the pattern adopted in the preceding statutes and do not merit particular attention. What then is the judgment to be passed on this far-reaching measure? During the passage through Parliament considerable prejudice against the Bill was manifested in both Houses and in the letter columns of the Press. The date when the Act is to come into operation is dependent, to a large extent, on the action taken by other N.A.T.O. countries to ratify the 1951 Agreement, and there can be little doubt that reciprocity is the only possible justification for this fundamental change in the law.

J. LL. J. EDWARDS.

Town Development Act, 1952 [1]

The Royal Commission on the Distribution of Industrial Population (the Barlow Commission) reported in 1940 in favour of decentralisation and dispersal. It has long been widely accepted that some methods must be devised to prevent the spreading of urban areas and, as the present Minister of Housing and Local Government has put it, "If towns are not allowed to swell they must be encouraged to hop." The New Towns, under the Act of 1946, represent a hop into, generally, the more open spaces. The Town Development Act, 1952, is designed to encourage the hopping of the surplus population of the overgrown urban areas into nearby towns. In other words, it encourages the swelling of smaller towns as an alternative to the swelling of bigger towns. The most usual case will be the transfer of population from a county borough or the London area (the "exporting" authority) to a non-county borough or urban district (the "receiving" authority).

There are two major problems in any such arrangement. The first is administrative and the second is financial.

The administrative problem (which also has its financial aspect) is how to ensure the co-operation of the two or more authorities concerned. The Act enables (sections 7, 8) the exporting authority, the county council of the receiving authority and a joint water or sewerage board (on which the receiving authority is represented) to participate by undertaking or bearing the expense of a part or the whole of the necessary operations. For this purpose the participating authority is empowered inter alia, on behalf of the receiving authority, to do anything which the receiving authority could lawfully employ an independent contractor to do, or to exercise powers outside their area although such exercise may not be for the benefit of their area, or to assign the right to receive certain housing Exchequer subsidies, or to make or receive payments between the authorities. The exercise of these powers depends on the agreement of the receiving authority but the Minister has power (section 9) to make an order authorising the participating authority to exercise the powers despite the opposition of the receiving authority. Such an order must be approved by Parliamentary resolution.

The financial problem is how to assist the receiving authority. The Minister is empowered (section 2) with Treasury approval to make grants to receiving authorities towards inter alia, the acquisition of land and of site preparation and the provision of water and sewerage services. Similarly, the exporting authority may make contributions (section 14). The Minister has said, of his grant to the rate contribution, that it would be available "where it is the only way in which we shall get the houses built in the

[1] 15–16 Geo. 6 & 1 Eliz. 2, c. 54. For Parliamentary Debates, see: 496 H.C.Deb. 5s. cols. 723–73, 837–87, 1550; 502 cols. 49–165, 527–622; 504 cols. 1407–24, 1853, and 177 H.L.Deb. 5s. cols. 195, 522–37, 1065–87; 178 col. 104.

right places, and where it would not be reasonable to expect the exporting authority to pay. . . . The general principle will be that the exporters will contribute to the statutory rate charge broadly to the extent that their own urgent housing needs are directly relieved by the houses that are being built." Both the Minister and the exporting authority may attach conditions to their contributions. These may be such as appear to the contributing authority to be expedient for securing the intended relief from congestion or over-population (sections 3, 4). The Minister may withhold his contribution if a condition is not observed. Finally, in certain cases, there may be a Ministerial grant to a participating authority (section 10).

It is very difficult to assess the importance of this Act or its financial consequences. Much may depend on the extent to which the Minister uses his compulsive powers under section nine. He has said, in the course of the debates, that " the purpose of the Bill is that the large cities wishing to provide for their surplus populations shall do so by orderly and friendly arrangements with neighbouring authorities . . . I want to make it clear that it is our purpose that all these arrangements should be reached by friendly negotiations and not imposed by arbitrary power." Of the power in section 9, the Minister said: " I hope this power will be regarded as being one in reserve and seldom, if ever, brought into play." This is the attitude of an optimistic ostrich. But perhaps Mr. MacMillan will succeed where others have failed in inspiring love between county boroughs and the adjoining areas in administrative counties. A second uncertainty is how far industry will arise to support the transferred population, for it is not the intention that the new arrivals in the enlarged town shall travel backwards and forwards across the green belt. The Act is not meant to provide new dormitories but to create larger self-contained communities. The third uncertainty is the amount of the financial contributions. The Minister denied that there could be any determining principle. The only criterion he could suggest was : " we must try to find, in practice, a middle course between being too niggardly and too lavish, too prodigal or too miserly. It will be necessary for the Minister to be satisfied that there is a real need to contribute to an undertaking of this kind before he makes any financial contribution."

J. A. G. GRIFFITH

DISPOSAL OF UNCOLLECTED GOODS ACT, 1952

THE Disposal of Uncollected Goods Act, 1952, remedies the injustice suffered in the past by repairers and other bailees who received goods from the public for treatment, when the goods, after they were ready, were not collected and the services and materials used remained unpaid for. To take but one example, it has been estimated that boot and shoe repairers have had at one time as many

as 450,000 uncollected repairs on their shelves, at an estimated value of at least £166,000 in labour and materials.

In these circumstances, the common law failed to provide an adequate remedy. Of course the bailee could have brought an action against the bailor in the courts to enforce his contract, but this was too cumbersome and expensive a remedy for the amounts involved and often the bailee, because he had not taken the bailor's address, did not know where to find him. The bailee also had a possessory lien over the goods enabling him to retain possession until he was paid or the money tendered. But unfortunately, unlike the pawnee, the bailee had no common law power of sale. His possessory lien merely gave him the right to remain in possession. The simple remedy of sale, with due safeguard for the bailor, would have been ideal, but if the bailee had sold he would have been open to an action for conversion—the bailee-repairer being in the same position as an innkeeper before the Innkeepers' Liability Act, 1878, gave the latter a power of sale. *Mulliner* v. *Florence* (1878) 3 Q.B. Div. 484. The recent cases of *Sachs* v. *Miklos* [1948] 2 K.B. 23, and *Munro* v. *Willmott* [1949] 1 K.B. 295, illustrate still further the vulnerability of the bailee. The defence that he acted in selling as an agent of necessity was difficult if not impossible to sustain and the fact that the bailor had disappeared and could not be found helped him not at all. Furthermore, such a sale would not have conveyed a good title to a purchaser, for the repairer as bailee had no more than a special property in the goods to convey.

The only way in which the bailee could have improved his position was by expressly reserving to himself in his contract with the bailor a power of sale. Apparently some business firms have attempted to do this by the usual device of printing contractual terms on their receipts and tickets. But, as was pointed out on the motion for leave to bring in the Bill, the mere placing of such printed terms on a ticket or the like did not make them necessarily enforceable. The bailee was never certain that he could convince a court that the terms were in fact contractual terms, and unless he could so satisfy the court, he remained liable for conversion on sale.

The new Act sets out to remedy the position by giving to the bailee a statutory power of sale and thus by implication providing but one more statutory exception to the principle *Nemo dat quod non habet*. The Act applies to the bailment of any goods accepted, whether before or after the commencement of the Act, by the bailee in the course of business, for repair or other treatment, on the terms that they will be redelivered to the bailor, or according to his directions, when the repair or other treatment has been carried out, and on payment to the bailee of such charges as may be agreed or as may be reasonable (section 1 (1)). In such circumstances if the goods are ready and the bailor fails both to pay or tender the charges due, and to take delivery of the goods, or give directions as

to their delivery, the bailee shall have a power of sale—this power being subject to any agreement between the parties (section 1 (2)).

Of course such a power of sale must operate subject to the conditions specified in the Act and designed to protect the bailor. One cannot help but feel that they are so stringent as to reduce considerably the efficacy of the Act. For one can only assume that if they are not complied with in every detail, the bailee and his purchaser may lose the protection of the Act. The bailee in such circumstances may be reluctant to make use of the new provisions.

In outline the conditions are as follows :

(1) A notice must be displayed at *all* premises used by the bailee for accepting such goods for repair or treatment, and must state that acceptance of the goods is subject to the Act (section 1 (3) (*a*)). This requirement is relaxed where goods were accepted before the Act came into force. The notice is effective even though goods are not accepted at any such premises but, for example, are collected. This condition throws a heavy burden on traders because they will not have the power of sale unless they put up a notice in all the premises where they accept goods. This is especially so where a concern covers the whole country.

(2) Two written notices must be sent to the bailor. The first is to tell him the goods are ready and that the bailee intends to sell if he is not paid and the goods not taken off his hands within twelve months. The second notice which is served not less than twelve months after the first and at least fourteen days before the intended sale, informs the bailor that the bailee intends to sell the goods if the bailor does not pay and take delivery within fourteen days (section 1 (3) (*b*) (*c*) and section 1 (7)).

This requirement means that the bailee must take the address of the bailor, a precaution which he may not have taken in the past.

(3) The goods must be sold by public auction unless in the notice of his intention to sell the bailee states the lowest price which he is prepared to accept on a sale of the goods. In this case he may sell the goods for not less than such price otherwise than public auction (section 1 (3)). Apparently, the bailee may purchase the goods himself in accordance with the Act and although the auction must be public there is no provision requiring advertisement.

(4) Where the proceeds of sale exceed the bailee's charges, the bailor may recover the excess, and similarly when the proceeds do not meet such charges the bailee may recover the balance from the bailor (section 3 (1)). The bailee may include in such charges not only his charge for repair or treatment, but also reasonable storage charges, costs of sale, and the cost, if any, of insuring the goods (section 4 (2)).

(5) After the sale and for a period of six years, the bailee must—at the risk of penal consequences on failure—keep a full record of the sale and be ready to produce it for inspection by the bailor (section 3 (2) (3)).

Special provisions are made to deal with a deposit of goods before the commencement of the Act (August 1, 1952) where the address of the bailor is not known (section 5) and also to deal with the position where a dispute arises between the parties (section 1 (4) (5)). Where the rights and obligations of the bailor or bailee with reference to the goods are vested for any period in some other person, that other person shall have the rights and obligations conferred by the Act (section 4 (3)). This provision is designed to provide for persons who acquire rights over the goods either by contract or by operation of law from the bailor or bailee, as for example the personal representative of the deceased bailor.

The Act gives no further guidance on title. Presumably a sale in pursuance of the Act will not operate so as to mend an inherent defect in title, as where the bailor has stolen the goods. The position seems to be identical with that under the Pawnbrokers Act, 1872, which is illustrated in *Burrows* v. *Barnes* (1900) 82 L.T. 721. In this case, a purchaser-pawnbroker of an unredeemed pledge sold by him under section 19 of the Pawnbrokers Act, obtained no title as against the true owner of the goods, which had been fraudulently pledged by the pledgor. Furthermore, if the Act had been intended to perfect such a defect in title, it is suggested that it would have expressly provided for it. One can compare the way in which provision is made in section 15 of the Bankruptcy and Deeds of Arrangement Act, 1913, which expressly states that the purchaser from the Sheriff shall acquire a good title. *Curtis* v. *Maloney* [1950] 2 All E.R. 201.

Where the purchaser's title is defective, it is relevant to consider his remedies, if any, against the bailee. It is suggested that the purchaser will not be able to rely on the implied undertakings as to title and quiet possession contained in section 12 of the Sale of Goods Act, 1893, for in this case, if the auctioneer discloses that his principal is selling under the Act, and not as owner, a contrary intention will be apparent. The circumstances are similar to a sale by an auctioneer under an invalid distress warrant. *Payne* v. *Elsden* (1900) 17 T.L.R. 161. Therefore it is suggested that the purchaser should either insist on an express undertaking as to title or take the element of risk into account when making his bid. Such an express term should be extended to protect the purchaser where the bailee has failed to comply with the Act, and the purchaser, as a result, is disturbed in his possession: although in this case, in the absence of an express term, the purchaser may be able to rely on an implied term that the Act has been complied with. The purchaser from a pawnbroker can rely on an implied term to the effect that the article has been pledged with him and that the time allowed for redemption has passed. *Morley* v. *Attenborough* (1849) 3 Exch. 500.

J. D. Newton

NOTES OF CASES

Law Reports

The thanks of the profession are owed to the Incorporated Council of Law Reporting and the proprietors of *The Times Law Reports* for their combined action which has resulted in the greatest single contribution since 1865 to the rationalisation of law reporting in this country. With the appearance of *The Weekly Law Reports* we should be provided, under the official auspices of the profession, with a speedy report of every decision of sufficient interest to appear in any general series of law reports. An old friend, *The Times Law Reports* has disappeared, as has an equally old, but less valued, acquaintance *The Weekly Notes*. The former fulfilled a valuable function in the past but the time had come for it to go into honourable retirement, and a tribute should be paid to its proprietors for recognising this fact and for their public-spirited action in agreeing to it.

This represents the latest stage in a remarkable process of consolidation which has led to the disappearance as independent entities of a multiplicity of general series of law reports which made the task of the lawyer so unnecessarily difficult. There are now only three extant series—*The Law Reports* and *The Weekly Law Reports*, sponsored by the Incorporated Council, and the *All England Law Reports*, maintaining an independent existence as a commercial enterprise. These will, of course, be supplemented by specialised series such as *Lloyd's List*, *Criminal Appeal* and *Planning and Compensation Reports* and those issued by the Ministry of National Insurance from whose system of indexing and digesting the Incorporated Council might learn much. These meet an obvious need. Whether, on the other hand, it is in the interests of the public and the profession that the *All England Law Reports* should continue is more arguable. They have undoubtedly justified their existence since they came into being in 1936. They established a new standard of speedy and accurate reporting and their competition led to the disappearance or merger of many of their rivals. It may be argued that their healthy competition is still needed to keep the Incorporated Council up to scratch. On the other hand, if they merely duplicate *The Weekly Law Reports* they will be a nuisance, and if they report additional cases of minor interest they may be an even greater nuisance. The theoretical ideal is undoubtedly one series which concentrates on speed and another which concentrates on meticulous accuracy with a smaller number of the most important cases. Both these the Incorporated Council have promised to provide. If they live up to their promise

the *All England Law Reports* will become otiose—but for the present the proprietors of the latter may be right to wait and see.

MENTAL CRUELTY

IN two recent decisions, *Jamieson* v. *Jamieson* [1952] 1 All E.R. 875 and *King* v. *King* [1952] 2 All E.R. 584, the House of Lords has attempted further to elucidate the concept of mental cruelty. Cruelty, like desertion, is a ground for divorce which cannot easily be defined in the abstract. It is not an event, but a state of affairs and to some extent similar to grounds of divorce known to foreign legal systems, such as "grave injuries," "destruction of the marriage," which refer to the state of the matrimonial relations as a whole. "The general rule in all questions of cruelty," said Lord Normand in *King* v. *King*, at p. 586, "is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations or taunts." In other words, where the court has to deal with a case of "mental cruelty," it must not adopt an "atomising" attitude and look at incidents and events in isolation but must endeavour to gain an impression of the atmosphere, or as Lord Merriman put it in the *Jamieson Case*, at p. 879, "the general picture of the married life." In does not make any difference whether, as in *Jamieson*, the alleged mental cruelty takes the form of inconsiderate, humiliating and brutal conduct on the part of the husband, or, as in *King*, of nagging and unfounded accusations on the part of the wife. In matters of this kind the total may be larger than the sum of its parts, and "what on paper may seem little more than a series of pinpricks may present a very different aspect when it has been developed in evidence" (Lord Normand in *Jamieson*, at p. 878). Hence the need for extreme caution in disturbing the findings of the trial judge in such cases (see *Thomas* v. *Thomas* [1947] 1 All E.R. 582), the need for a sparing application of the Scottish procedure of dismissing a divorce action *a limine* by reason of the "irrelevancy" of the facts averred in the pursuer's condescension, and, one may add, the need for a certain reluctance in treating as precedents any decisions of the courts in matters of mental cruelty. It is fatally easy to give to remarks made by judges in matters of this kind a general significance which, in the nature of things, they cannot have. In such cases it is the office of the court to examine the conduct of the spouses, often in great detail, and to arrive at a decision based more on a general impression derived from these facts than on principles capable of being formulated in the abstract and of serving as signposts for future developments. The attitude of the judge towards the general problems of marriage and divorce, his ethical convictions and psychological insights are more

important in the making of his decision than any legal rules. It is not difficult to understand why, in both cases under review, there should have been a profound conflict of judicial opinion in the lower courts (the First Division of the Court of Session in *Jamieson* and the Court of Appeal in *King*), and, in the second case, also in the House of Lords. In essence these were conflicts not about the law but about the appraisal of the facts before the court. Nevertheless, both cases, and particularly the *Jamieson Case*, clarify a number of legal issues. Moreover, both cases, especially the *King Case*, give food for the thoughts of those who are interested in the future of divorce law and procedure.

From the legal point of view, *Jamieson* was the more interesting of these two cases. One of the main points in this Scottish case was that the House of Lords, consisting of two Scottish (Lords Normand and Reid) and two English (Lords Merriman and Tucker) Lords of Appeal, unanimously held the concept of cruelty in Scots law to be identical with that of English law. This is not by any means a matter of course. In *Weatherley* v. *Weatherley* [1947] A.C. 628, Lord Normand pointed out that desertion had a different meaning in the two countries, while in *Thomas* v. *Thomas* (*supra*, at p. 585) Viscount Simon, in his dissenting judgment, expressed the view that there was no material difference between the two systems as regards the meaning of cruelty. This was affirmed by the four Lords of Appeal in *Jamieson*, including Lord Normand who (at p. 878) explained that some observations he had made in *Weatherley* (at p. 635) about the limited precedential value of English divorce decisions in Scotland and vice versa referred only to desertion.

The Lord President had said that recently several decrees on the ground of cruelty had been pronounced in England which would not have been granted in Scotland. He indicated that this state of affairs might be attributable to the " Scottish character " which, he said, was " of tougher fibre or of blunter susceptibilities," or to the " Calvinist tradition " which " still found expression in a deeper sanctity of the marriage tie and its obligations." One does not have to share the present writer's profound distrust of all statements on so-called " national character " to see that it is highly dangerous to call in aid divergences in " national " predispositions or traditions for the explanation of differences between English and Scottish law. That this is especially unfortunate in the field of divorce law was cogently demonstrated by Lord Normand (at p. 879):

> " It has sometimes been said in England that the Scottish courts have been too easy and liberal in granting divorce, and sometimes the same has been said in Scotland of the English courts. Allowance in judging of the significance of language or conduct used by one spouse to another must be made for national, local and social habits, but I

> would find it difficult to sustain an argument that a country which, since the Reformation, has allowed divorce for adultery to either spouse or to both spouses, and has, since 1573, allowed divorce for desertion to either spouse, has consistently followed a tradition more favourable to the sanctity of the marriage tie than a country which permitted no action for divorce in its courts until the year 1857."

Divorce by reason of cruelty was introduced in England by the Matrimonial Causes Act, 1937, and in Scotland by the Divorce (Scotland) Act, 1938. There is a slight difference in the wording of the two statutes. Section 176 of the Judicature Act, 1925, as amended by section 2 of the Matrimonial Causes Act, 1937 (now section 1 (c) of the Matrimonial Causes Act, 1950), makes it a ground for divorce that

> "the respondent . . . has since the celebration of the marriage treated the petitioner with cruelty."

Section 1 (1) (a) of the Divorce (Scotland) Act, 1938, says that a marriage can be dissolved if

> "the defender . . . has been guilty of such cruelty towards the pursuer as would justify, according to the law and practice existing at the passing of this Act, the granting of a decree of separation *a mensa et thoro*."

Lord Normand was able to show that the reasons for this difference are purely historical and that "it ought not to have led to any divergence in principle between the law of Scotland and the law of England as regards the kind of cruelty necessary for divorce" (p. 879). Although the English Act does not say so *expressis verbis*, cruelty for the purpose of divorce has in England the same meaning it had and has for the purpose of separation. This was demonstrated by Lord Merriman (pp. 882 *et seq.*), who entered upon a close analysis of the significance of "cruelty" in English law in the various contexts in which it is relevant (divorce, separation, discretionary bar, maintenance and other orders in the court of summary jurisdiction) and came to the conclusion that its meaning is the same in all these contexts. That cruelty as a ground for divorce must be the same as the traditional ground for separation emerges clearly from what is now section 14 of the Act of 1950, which deals with separation decrees. This enables a spouse to obtain a judicial separation on any ground on which he or she might have obtained a divorce *a vinculo matrimonii* and also on any ground on which a divorce *a mensa et thoro* might have been obtained prior to 1857. It is unthinkable that Parliament intended to embody in this provision two different concepts of cruelty.

All this was not, of course, an academic exercise in comparative law and in legal history. Its practical importance arose from a number of recent decisions, of which *Meacher* v. *Meacher* [1946] P. 216 was the most important. In that case, it will be remembered, Henn Collins J. dismissed a wife's divorce petition based on the husband's cruelty on the ground that, as a result of the separation

of the spouses, the acts (assaults) complained of were not likely to continue and also on the ground that the wife could have stopped the husband's cruelty by submitting to his unreasonable request not to pay any further visits to her sister. The Court of Appeal allowed the wife's appeal and granted the decree. Lord Merriman (at p. 884) strongly emphasised that he regarded the decision of the Court of Appeal as correct. He disagreed, however, with the view expressed by Morton and Bucknill L.JJ. that the apprehension of future danger was irrelevant. From the point of view of English law this is much the most important aspect of the *Jamieson Case*. Despite the wording of the Matrimonial Causes Act ("has since the celebration of the marriage treated the petitioner with cruelty") cruelty as a ground for divorce has today the same meaning which was given to it in the leading case of *Russell* v. *Russell* [1897] A.C. 395. In the words of Lord Merriman (p. 883):

> "It comprises two distinct elements: first, the ill-treatment complained of, and secondly, the resultant danger or the apprehension thereof. Thus it is inaccurate, and liable to lead to confusion, if the word 'cruelty' is used as descriptive only of the conduct complained of, apart from its effect on the victim."

A spouse who desires the dissolution of the marriage by reason of the other spouse's cruelty must satisfy the court not only that he or she has suffered in the past but also that he or she is in need of protection in the future. This is perhaps the most fundamental difference between cruelty as a ground for divorce and adultery or desertion.

The true meaning of this "need for protection" or "apprehension of future danger" cannot, however, be understood unless two corollary principles are taken into account, both of which were formulated by Lord Merriman.

In the first place the situation the court has to envisage in order to assess the need for protection is the resumption of cohabitation. The profound fallacy underlying the judgment of Henn Collins J. in *Meacher* was that he permitted the husband who by his cruelty had driven the wife out of the house to argue that now she had nothing to fear from him since she had gone. In practically all cases of divorce petitions based on cruelty the spouses are likely to live apart at the time when the case comes before the court. If "apprehension of danger" meant "danger in the situation prevailing at the time of the decree," cruelty as a ground for divorce would be nullified. The court must, somewhat unrealistically perhaps, act on the hypothesis that, in the event of a dismissal of the petition, the parties would resume cohabitation and ask itself whether, in that hypothetical situation, the petitioner would be in danger.

Secondly, however, "need for protection" and "apprehension of future danger" are not synonymous with the likelihood of future

acts of cruelty, either of the same kind as occurred in the past or of any other kind. The essence of the matter is the danger to the health of the petitioner. The conduct of the respondent may have been such that, in the event of a resumption of cohabitation, the mere apprehension of its repetition may be injurious to the health of the other spouse, although objectively the likelihood of such repetition may not have been proved to the court. Having proved the respondent's cruelty in the past, the petitioner is, it seems, entitled to be protected against dangers to health engendered by his or her own apprehensions no matter whether a cool impartial observer would have shared them.

If this is the correct interpretation of Lord Merriman's judgment, some of the objections *de lege ferenda* against the need for proving future danger may have been removed. Nevertheless, it remains incongruous that while in the cases of adultery and desertion all the petitioner has to do is to prove past facts, he should, in the case of cruelty, be called upon to convince the court that past facts are likely to cast their shadow into the future. One cannot but agree with the view expressed in a Note in 68 L.Q.R. 291 (July, 1952) that this point deserves the attention of the Royal Commission on Marriage and Divorce. The function of divorce, it is submitted, is to dissolve the marriage tie where the consortium has been destroyed. Grounds for divorce should be no more than *indicia* that this has happened. This, it is further submitted, should be true of all grounds for divorce. The existence of a ground for divorce raises, as it were, an irrebuttable presumption that the dissolution of the marriage is in the interest of the spouses and in the public interest. If this is true of adultery, why should it not be true of cruelty, physical or mental? Why should it not be sufficient for the petitioner to show that his or her health has been injuriously affected by the respondent's conduct? Is not the requirement of proof of future danger a vestige of a past age which looked upon cruelty as an "offence" less grievous than adultery? And is this view compatible with the moral code prevailing among the majority of the people today? The whole question may not be of very great practical importance, but it raises an issue of principle which goes to the root of the law of divorce.

Jamieson v. *Jamieson* also throws some further light on the problem whether cruelty as a ground for divorce requires what one may call (with an expression the writer hesitates to use) a *mens rea*. It was again emphasised by Lord Merriman (p. 881) that proof of intention to injure is not an essential element in cruelty, and this was also expressly pointed out by Lord Reid (p. 886). Nevertheless intention is not irrelevant. It is, if proved, a fact which aggravates the cruelty. Deliberate acts are, because of their deliberate character, more likely to hurt than mere neglect or "unwarrantable indifference." The importance of this seems to be connected with another point, also raised in the judgments: in judging the question

of injury to health, must the court apply an objective standard, *i.e.*, ask whether the respondent's conduct would have been injurious to a person of normal sensitivity, or must it ask whether the petitioner's health did in fact suffer, although this was due to his or her abnormal susceptibility? On this important point Lord Normand (p. 877) adopted the guarded words of the Lord President. The respondent's (defender's) conduct "must be judged up to a point by reference to the victim's capacity for endurance," but only "in so far as that capacity is or ought to have been known to the guilty spouse"—with the result that, in these critical cases, the problem of *mens rea* reappears, so to speak, through the back door. Still he thought that the victim's hypersensitiveness could exclude cruelty only in exceedingly rare cases. Here again we have a problem which is more important for the principle it involves than for the practical issues it raises. Husband and wife will normally be very well aware of their mutual susceptibilities, and ignorance of the effect of the conduct of one upon the health of the other will be a plea which sounds hollow. But, it is submitted, the objective fact that the health of either spouse has suffered should always be sufficient, even without a recurrence to the time-worn maxim that a man or woman must be deemed to have intended the consequences of his or her conduct (see p. 881 (Lord Merriman), p. 886 (Lord Reid)).

This problem of the so-called *mens rea* was also very prominent in *King* v. *King*, which was an English case. In this case the wife had injured the husband's health by her constant nagging, especially by her jealousy and unfounded charges of adultery. On the other hand, he had for a time committed adultery with a woman who afterwards became his brother's wife, and he had been guilty of conduct which amounted to cruelty, including an accusation that the respondent had taken a drug so as to have a miscarriage. Barnard J. granted the husband's petition, but his decision was reversed by a majority of the Court of Appeal (Denning and Hodson L.JJ., Somervell L.J. dissenting). The husband's appeal to the House of Lords was dismissed by a majority of three (Lords Jowitt, Normand and Reid) against two (Lords Oaksey and Asquith of Bishopstone). Without going into the details of the case, one can say that the marriage had collapsed beyond hope. "The husband's conduct," as Lord Normand said (at p. 588), "was not a wit better than the wife's. They were both blameworthy and each was guilty of a behaviour which, considered without reference to the behaviour of the other, might be regarded as cruel." The legal importance of the case must be found in the principle stated by Lord Reid (at p. 598), "that it is not right first to ask whether the wife's conduct was cruel in fact, and then to ask whether it can in any way be justified. The question whether the wife treated her husband with cruelty is a single question only to be answered after all the facts have been taken into account."

Having taken into account all the facts, the majority arrived at the view that the wife, although she had derived satisfaction from inflicting pain (Lord Normand, at p. 589), was not guilty of cruelty because her conduct was not (Lord Reid, at p. 596) "inexcusable after taking everything into consideration." "When a husband and wife have reached the stage of unending accusations and recriminations, the wife's satisfaction in inflicting pain may be the reflex of the bitterness and pain suffered by her. . . ." In order to understand the case, it is perhaps relevant to know that the wife was a Roman Catholic who did not desire a divorce, and that, when the case came before the court, the spouses had parted for good and the wife had returned to her home in Switzerland. The effect was thus to tie the husband to a childless marriage which to all intents and purposes had ceased to exist. The case could give an opportunity for rehearsing all the well-known arguments against keeping in being the empty shell of a marriage. For those who do not attach any metaphysical significance to the matrimonial relationship it is incomprehensible why a court of appeal should go out of its way to interfere with the finding of the trial judge so as to perpetuate a marriage which has lost its reality. In circumstances such as these, and this is the point which, in the writer's submission, should be considered *de lege ferenda*, the court should have the power to dissolve the marriage either by reason of the fault of both spouses or by reason of the fault of neither. If necessary it might be appropriate, by reformulating section 6 of the Matrimonial Causes Act, 1950, to enable a respondent who for religious or other reasons is opposed to divorce to ask the court to dismiss the petition, but, in the event of a dissolution, to pronounce it on the ground of the fault of both spouses.

O. Kahn-Freund.

The Straffen Case

The case of John Thomas Straffen has caused much public interest and concern. The facts of the case are well known. Straffen was charged in 1951 with the murder of two small girls and was found unfit to plead on the ground of insanity. He was committed to Broadmoor Institution, whence he escaped in April 1952 for some four hours. The next day the body of another small girl—Linda Bowyer—was found in a village near the Institution. She had been recently strangled. Straffen was indicted for the murder of Linda Bowyer and was found guilty. The Court of Criminal Appeal dismissed his appeal against conviction : *R.* v. *Straffen* [1952] 2 All E.R. 657.

The question which has caused most public debate is whether a man who is found unfit to plead on one occasion can on another occasion, less than a year later, be found guilty of murder. On

this point the legal logic of the case—if the phrase may be pardoned—is unchallengeable. The controversy that has arisen around it appears to be beyond the scope of this Review and is best left to be ventilated in the national Press.

One point, however, merits mention in this connection, if only because it appears to have been generally overlooked. In *R.* v. *Summers* [1952] 1 All E.R. 1059, Lord Goddard C.J. criticised the time-honoured phraseology used by judges in directing juries in criminal cases: that the jury must not convict unless they are satisfied beyond reasonable doubt of the prisoner's guilt. "I have never yet," he said, "heard any court give a real definition of what is a 'reasonable doubt' and it would be far better if that expression was not used. . . . It is far better . . . to say to a jury: 'You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed.' Cassels J. in the present case followed that advice and is reported to have said: "If they [the jury] were *satisfied* that it was Straffen's hand that brought life to an end, then their verdict would be one of guilty of murder. The jury should then go on, if that was their conclusion, to ask themselves whether they were *satisfied* by the defence that at the time Straffen was insane within the meaning of the criminal law" (*The Times Newspaper*, July 26, 1952, page 3. Italics supplied). Such language could give only one impression to the jury—that the burden on the defence of proving insanity was as heavy as that on the prosecution of proving guilt. But this is contrary to the rule laid down by the Privy Council in *Sodeman* v. *R.* [1936] 2 All E.R. 1138 that the burden of establishing the defence of insanity is no heavier than that which lies upon a party in a civil case. This was approved by the Court of Criminal Appeal in *R.* v. *Carr-Briant* [1943] K.B. 607, 610 and must now be considered to have been adopted by the English criminal courts (in spite of the doubts expressed in *Phipson on Evidence*, 9th ed., at p. 9). It is surely confusing and undesirable to use the same word to describe the different duties of prosecution and defence. Nor is it quite clear what additional precision is ever gained by using the word "satisfied" in place of the old phrase "satisfied beyond reasonable doubt." The word "satisfied" standing alone is notoriously ambiguous. If the advice given by Lord Goddard C.J. in *R.* v. *Summers* leads to confusion in cases of insanity and achieves no positive good in other cases, then it is submitted with the greatest respect that it would be better if that advice could be withdrawn.

The main ground of the present appeal was as to the admissibility of evidence proving that Straffen had killed the two girls with whose murder he was charged in 1951. The Court of Criminal Appeal upheld the ruling of Cassels J. that this evidence was admissible, but the precise ground on which it was held admissible

is not quite clear. Slade J. put the matter as follows: "In the judgment of the court, this evidence was admissible because it tended to identify the person who had murdered Linda Bowyer with the person who had confessed in his statements to having murdered in similar circumstances a year before Brenda Goddard and Cecily Batstone" (at p. 622).

Now in this case there are two possible processes of identification. The first runs as follows: (i) it appears from the circumstances of each killing that the man who killed A and B also killed C, (ii) the accused killed A and B, (iii) hence the accused killed C. The second process would be: (i) it appears from the circumstances of the deaths of A and B that the person responsible for these killings had a propensity to do acts like killing C, (ii) the accused killed A and B, (iii) the accused therefore had this propensity, (iv) hence the accused was the man who killed C. On the first argument the accused is identified not by any quality in himself but by a quality in the various crimes. On the second argument he is identified by a personal characteristic. Identification through a "hall-mark" on the criminal has been frequently allowed—even though that hall-mark is a criminal propensity which is proved by other criminal acts: see the line of cases from *Thompson* v. *R.* [1918] A.C. 221 to *R.* v. *Hall* [1952] 1 K.B. 302. If however in *R.* v. *Straffen* the identification was achieved through a hall-mark not on the criminal but on the crime, the present case appears to involve a new departure. It is unfortunately not clear just which of these two processes was adopted by the court. The portion of the judgment quoted above seems to suggest the first. So also perhaps does the statement that the "irrefragable rule that evidence of the commission of criminal offences not covered by the indictment shall not be admitted for the purpose of proving that the accused is a person of criminal disposition or even that he has a propensity for committing the particular type of crime charged," is subject to "certain recognised exceptions . . . under which evidence is admissible of other crimes committed by the accused, the reason for its admission being that it tends to prove, not that he is a man who has criminal propensities, but that he was the man who committed the particular offence charged" (at p. 659). It must be admitted, however, that the shift in terminology from "criminal disposition" to "propensity" and then to "criminal propensity" makes it difficult to determine precisely what the learned judge had in mind. It also foreshadows future difficulties of no negligible proportions. But in a later part of the judgment Slade J. is more explicit. "I see no distinction in principle between this case and *Thompson* v. *R.* and indeed I cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification. . . . It is an abnormal propensity to strangle young girls without any apparent motive, without

any attempt at sexual interference, and to leave their dead bodies where they can be seen and where presumably their deaths would be rapidly detected" (at p. 662). This suggests that the accused was not identified merely from the similarities of the three killings but by a propensity deduced from the first two killings which was inferred also to have been present in the person who murdered the third girl. If, then, the accused was identified through this propensity, the case also involves a new departure, for in no previous English case has the argument that a person may be identified through an abnormal propensity yet been applied except where the propensity was one to indulge in abnormal sexual practices. It is clear from the judgment of Slade J. that the Court of Criminal Appeal is now prepared to apply this process of identification much more generally, *e.g.*, even to cases of housebreaking (see the concluding part of the judgment at p. 662).

What, then, has become of the "irrefragable rule" that evidence is not admissible to show that the accused has "a propensity for committing the particular crime charged"? It would seem to be undermined from two directions. In the first place, it is now difficult to say what propensities are "abnormal." It can surely not be suggested that in the present case there would have been no "abnormal" propensity if there *had* been apparent motive, attempts at sexual interference and efforts at concealment. Is it, then, possible to say that *all* criminal propensities are "abnormal"? The concluding part of the judgment goes a long way towards this, but if this is indeed the position the "irrefragable rule" can be easily circumvented. Again, how many instances must be proved before a propensity can be established? Evidently two instances are enough, but there is nothing in the judgment in the instant case to indicate that one alone would not have sufficed.

It will, of course, be argued that such evidence as to propensity is only admissible where an issue of identity or some other issue, such as mistake or accident, which has formerly been held to justify the admissibility of similar fact evidence, has arisen. This, however, merely brings us to the second consideration which has gone to undermine the "irrefragable rule." In every criminal case the prosecution must prove three things—(i) that the act was done (ii) by the accused (iii) with criminal intent. The prisoner may decide to contest all or some of these matters, but if he decides to contest only some he still does not absolve the prosecution from the duty of proving them all, as there are no formal admissions in a criminal trial. Under (ii), therefore, an issue of identity always arises. Before *Harris* v. *D. P. P.* [1952] 1 All E.R. 1044, it was arguable that if the accused did not contest (ii) the prosecution could not bring in evidence as to (ii) which, if the accused had decided to contest the issue of identity, would have been admissible. This argument was open because of a dictum of Lord Sumner's in

Thompson v. *R.*, *supra*, to the effect that "it is paradoxical that the accused can exclude evidence that would be admissible and fatal if he ran two defences by prudently confining himself to one. Still, so it is." This paradox, which is of Lord Sumner's own invention, is no longer part of English law after *Harris* v. *D. P. P.* Lord Simon in that case said that "the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words [in *Makin* v. *Att.-Gen. for New South Wales* (1884) App.Cas. 57] to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal" (at p. 1047). Assuming, therefore, that the evidence of propensity is "proper" evidence it would now seem to be admissible irrespective of the issues which the accused decides to contest: so long as it is not "dragged in to his prejudice without reasonable cause": *Harris* v. *D. P. P.* (at p. 1048). If it is so dragged in, the question of its admissibility in strict law will scarcely ever arise. Under Lord Simon's second proposition in *Harris's Case*, if the evidence has a prejudicial effect which is substantially greater than its probative value the trial judge can, in the exercise of his discretion, exclude it even though it is strictly admissible.

It may be noted, further, that if the admissibility of similar fact evidence were still dependent on the raising of some particular line of defence in substance, if not in so many words, there would be a most undesirable distinction between cases in which the accused, in effect, could deny only the fact that the act was done by him, and those in which he could also effectively deny the fact that the act was done at all. In the first type of case, leaving aside the question of criminal intent, a mere plea of not guilty would in substance only raise the issue of identity. This was the position in *Straffen's Case*: it could not effectively be denied that the killing had been done. There is, on such facts, no distinction between saying "I did not do it" and saying "I am not the man who did it." In the second type of case, a mere plea of guilty would not equally make it clear that the accused is relying on the "defence" that he was not the man. The old formulation of the rule as to the admissibility of similar fact evidence would suggest that the evidence should be admissible in the first but not in the second type of case. This would in a way be the converse of Lord Sumner's paradox: a man who could effectively rely on only one defence would be in a worse position than one who could effectively rely on two. It is submitted that after *Harris* v. *D. P. P.* the converse no more represents English law than the paradox itself.

It may be objected that the views advanced in this note extend the admissibility of similar fact evidence too far and show a disregard for the traditional attitude of the English courts in criminal trials to give every possible protection to the accused which

is consistent with the attainment of a fair trial. It is submitted, however, that such an objection would be unfounded. Similar fact evidence almost always has a very high probative value and its admissibility in law should therefore be conceded on the broadest possible basis. Where the prejudicial effect of the evidence substantially outweighs its probative value, the accused is sufficiently protected by the discretionary power of the trial judge to exclude it under the second proposition laid down by Lord Simon in *Harris's Case*.

G. H. TREITEL.

RENT TRIBUNALS—A SLIGHT CASE OF MURDER

ON September 8, 1950, a tenant having referred his contract of tenancy of a furnished house to a rent tribunal under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, the tribunal gave a decision approving the rent and giving no direction as to security of tenure. Three months and one day later, the landlord served a notice to quit on the tenant who, before the end of the period in the notice, applied to the tribunal under the 1949 Act for an extension of his period of tenure. The tribunal extended the period for three months and subsequently made further orders granting extension. The Divisional Court quashed these orders by certiorari and in *R.* v. *St. Helens and Area Rent Tribunal, ex p. Pickavance* [1952] 2 All E.R. 9, the Court of Appeal (Jenkins L.J. dissenting) affirmed this decision.

The Act of 1946 (section 5) provided that if, after a contract had been referred to the tribunal, a notice to quit was served at any time before the decision was given or within three months thereafter, the notice should not take effect before the expiration of the three months, unless the tribunal directed that a shorter period should be substituted. The purpose of this was, of course, to give some protection to tenants against retaliatory landlords but not to give so much protection that landlords would be discouraged from letting at all. The purpose of the 1949 Act was to empower the tribunal to extend this period of security. It provided in section 11 that where a contract had been referred under the 1946 Act, the lessee might at any time when a notice to quit had been served and the period at the end of which the notice took effect (whether by virtue of the contract, of the 1946 Act or of this section 11) had not expired, apply to the tribunal, for an extension of that period. Such an application was not to be made, however, where the tribunal had directed (under the 1946 Act) that a period of less than three months should be substituted. The tribunal could grant an extension of not more than three months which could be further extended on subsequent applications.

The reasoning of the Divisional Court and of the majority of the Court of Appeal was that the 1949 Act gave no new power to the tribunal but only extended the power given by the 1946 Act. Therefore, for the 1949 Act provisions to operate, the notice to quit must have been served before the decision of the tribunal or within three months thereafter and since this was not the case here the extensions were invalid. In one sense, this is not exact. The three months' security under the 1946 Act exists by virtue of section 5 of that Act and not under a direction by the tribunal. The only power in the tribunal is to direct that a shorter period than three months should be substituted. Therefore the 1949 Act does give a new power—a power to grant security for periods of three months. On the other hand, the 1949 Act requires section 11 to be construed as one with the 1946 Act and it is clear that under the 1946 Act a notice to quit served more than three months after the decision of the tribunal had full force and that its operation could not be suspended.

The effect of the decision is to render valueless the power of the tribunal to extend the period of security, unless the landlord is foolish enough to serve a notice to quit before or within three months after the hearing by the tribunal. To appreciate the full lethal effect of the decision it must be remembered that, until a notice to quit is served, the tenant cannot apply to the tribunal for an extension of the statutory period of security. As Somervell L.J. said: "The Attorney-General submitted, I think with force, that on the Divisional Court's construction section 11 (1) is likely to be of very little assistance. Lessors will now not serve notices to quit within the period specified. On the view that Parliament intended to give some power to extend the period of three months from a decision, they do not seem to have effectively achieved that purpose." One consequence of the interpretation not adopted by the court, apart from giving the desired security, would be that if, in the words of Morris L.J., "a contract was referred to a tribunal by a lessor and if no change in the rent payable was ordered and if some years later a notice to quit was served, then, on an application by the lessee, the tribunal would have power . . . to postpone the date at which the notice to quit would have effect."

During the Committee stage on the 1949 Bill, the Minister was pressed by one Member to extend the section so as to give security where the first reference to the tribunal was preceded by a notice to quit. The Minister said: "This is not a Bill for the purpose of giving security of tenure. It is a Bill for the purpose of fixing reasonable rents for furnished lettings. . . . We must not always assume in these circumstances that the persons occupying the furnished lettings are invariably the persons with justice on their side" (Mr. A. Bevan, 461 H.C. Deb. 5s. col. 1233). On the other hand, as Jenkins L.J. said in his dissenting judgment: "Legislation for the control of rents is notoriously ineffective in

the absence of some degree of security of tenure and . . . the degree of security of tenure which it is necessary or desirable to provide in such legislation is essentially a matter for Parliament."

This seems to be the crux of the matter. The principal purpose of the three months' security in the 1946 Act was to prevent the Act from dying in practice the moment it was born in theory. On the other hand, it was clearly not intended that, by virtue of the 1949 Act, the security of a tenant in furnished accommodation should be the same as that of a tenant in unfurnished accommodation. In certain cases, security for several months or years might be justifiable. In others, three months or less might suffice. The Act placed the burden of decision on the tribunal. As the Minister said: "If the appeal is vexatious, the tribunal will not give an additional period" (461 H.C. Deb. 5s. col. 1242). On the facts of the present case, the tribunal found no cause to reduce the rent but equally found no cause to reduce the statutory period of three months' security. In this case, therefore, the Act became not one for the fixing of a reasonable rent but one for the giving of security of tenure. These particular facts seem to have weighed with the Court of Appeal. Somervell L.J. said: "One asks oneself on what principle Parliament could have intended to protect lessees whose applications are dismissed or lessees who applied unnecessarily because the rent is approved, but to withhold the same protection from tenants who were sensible enough not to put themselves and their lessors to trouble and expense from which they derived no advantage." These anomalies are, however, not strictly relevant. The same difficulties would arise in a case to which the Acts undoubtedly applied. The decision in the present case would be no different if the tribunal had found the rent to be grossly extortionate and had reduced it; but, had those been the facts, the argument that the tribunal was giving security rather than fixing a reasonable rent could hardly have been advanced.

In view of the conflicting anomalies, it seems that amending legislation is urgently required. But this does not mean that the present decision is beyond criticism. With respect, it can be argued that the existence of one set of anomalies does not appear to be sufficient ground for rendering a statutory provision abortive. The purpose of the 1949 Act was to prevent a lessor gaining possession in every case after the initial three months' period had elapsed. The decision frustrates this purpose. The "literal" rule was preferred to the "mischief" rule. The court could have given effect to the Parliamentary intention while protesting vigorously against the consequences in certain cases of the existing provisions.

Whatever the amendments made, a considerable discretion would have to be left to the tribunals. Over the last few years they have been attacked from all sides; this cannot have helped them to do their extremely difficult and necessary work. The distrust in high places has, however, not extended to those whom they were

created to assist, as the number of references (still running at about 10,000 a year) attests. At the same time, there is much ignorance about their work and a fear of the consequences of making a reference. What seems to be necessary is a power in the Minister to issue directions (which should be publicised) to the tribunals indicating in general terms the ways in which and the purposes for which their discretion should be exercised. By this method any persistent tendency of the tribunals, for example, to grant continued security of tenure as a matter of course, could be checked. At the same time, if this power were properly used, the independence of the members and the reliance on their assessment of the facts before them would not be affected.

The dispute on the proper function of the courts when faced with a failure on the part of Parliament to foresee the effect in particular cases of statutory provisions continues unabated. The views of Denning L.J. in *Seaford Court Estates* v. *Asher* [1949] 2 K.B. 481 at 499 and of Lord Simonds in *Magor and St. Mellons R. D. C.* v. *Newport Corporation* [1951] 2 All E.R. 830 at 841, for example, are not reconcilable.

In the 1949 Act, Parliament clearly entrusted to the tribunals the power and duty to exercise their discretion and to give relief where they thought just. This function the courts have now denied them and in so doing have made virtually impossible the giving of this relief in any circumstances. It may indeed have been that the tenant here acted unjustifiably in referring his rent to the tribunal. It may indeed be that in such circumstances security should not have been given, and that the landlord was being unfairly penalised. But hard cases make bad law.

J. A. G. Griffith.

Companies—Removal of Managing Director

One of the means whereby the Cohen Committee hoped to give the members of a company some measure of control over the management was by enabling them to dismiss a director by ordinary resolution. Accordingly by section 184 of the Companies Act, 1948, a director may at any time be removed by a resolution passed by a simple majority of the members, provided only that 28 days' special notice [1] is given of the intention to propose such resolution and that the director has a full opportunity of stating his case.[2]

The effectiveness of this section is, however, greatly diminished by subsection (6), which provides that "nothing in this section shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the termination

[1] See definition in s. 142.
[2] s. 183 (2) and (3).

of his appointment as director or of any appointment terminating with that of director." If, therefore, the director has a service agreement with the company his rights thereunder are preserved. On the face of it this is fair enough; the company having elected to bind itself by contract, cannot complain if damages become payable when the service is brought to a premature conclusion. But, so far as concerns the entry into service agreements, the company is normally the directors, for it is the board that will have the powers to appoint and to fix the terms of service.[3] The members may therefore find, when they seek to exercise their powers of dismissal, that the directors have entrenched themselves with long-term contracts of service which will thereby be broken, giving rise to heavy claims for damages. Of these contracts the members may previously have known nothing[4] and the only protection which they have is that the board cannot now decide without reference to the general meeting the amount to be paid to a dismissed director by way of compensation.[5]

Hence the exercise by the members of their statutory power of dismissal may be an expensive luxury. On the other hand, the recent decision in *Read* v. *Astoria Garage (Streatham), Ltd.*,[6] shows that managing directors may not be so secure in the tenure of their offices as they had supposed. The company's articles incorporated article 68 of Table A of the Companies Act, 1929, which authorises the directors to appoint one or more of their body to the office of managing director upon such terms as they think fit. At a meeting of the board it was resolved that the plaintiff should be appointed managing director at a salary of £7 per week. The duration of the appointment was not specified and accordingly the normal rule would have been that the plaintiff was entitled to hold office until it was determined by reasonable notice.[7] Later the directors purported to dismiss him on one month's notice, and this dismissal was approved by the company in general meeting. The plaintiff sued for wrongful dismissal, contending that one month's notice was not reasonable.

Now, article 68 concludes by saying that a managing director's appointment " shall be automatically determined if he cease from any cause to be a director *or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.*" Harman J. held that the effect of this article was

[3] *Cf.* Table A, arts. 84 (3) and 107 to 109.

[4] All the members need know is the total emoluments payable to the directors which must be disclosed in the annual accounts circulated to them: s. 196.

[5] ss. 191 and 192. The exact extent of these sections is obscure. They appear to be worded sufficiently widely to cover damages for breach of contract as well as voluntary payments. Presumably, however, if damages were awarded against the company by a court or arbitrator the company could not refuse to meet the judgment or award by declining to ratify the payment in general meeting.

[6] [1952] 1 All E.R. 922, affd. [1952] 1 Ch. 637, C.A.

[7] *James* v. *Thos. H. Kent & Co.* [1951] 1 K.B. 551, C.A.

that the company, though it had delegated to the board power to appoint managing directors, had reserved to itself power to dismiss them without notice. Hence every contract entered into by the board must be deemed to be subject to the overriding power to revoke the appointment at any time whatever the contract itself might say. Accordingly the plaintiff had no claim, having indeed been given a month's notice when he had no right to any at all.

His decision was affirmed by the Court of Appeal [8] but on rather different grounds. They held that since the directors' resolution did not specify any terms other than remuneration the agreement must be deemed to have been on the terms of the appropriate article with such duration as was there specified. In other words, the agreement was not in reality one determinable on reasonable notice but one determinable by the company in general meeting without notice. On this basis the case need cause managing directors no great alarm and despondency. It is clearly in line with the well-established principle that, although the articles do not constitute a contract except between the company and its members as such,[9] provisions in the articles may be impliedly incorporated in a contract of service otherwise created.[10] If a director wants security of tenure he should ensure that his contract expressly provides for it; he, of all people, cannot plead ignorance of the articles.

But if Harman J. is right, then no contract will protect him if the articles are at the time [11] in similar terms to those of Table A of the 1929 Act. On this basis a large number of directors are living in a fool's paradise for their long-term service agreements are not, to them, worth the paper they are written on. Furthermore, the position would appear to be the same under the corresponding article in Table A of the 1948 Act. It is true that the article (107) omits the final words of its predecessor,[12] but this presumably is only because they are now unnecessary having regard to the new power to dismiss a director by ordinary resolution. There was no such power under the 1929 Act and under its Table A an extraordinary resolution (three-fourths' majority) was needed and hence the express provision that a managing directorship could be determined by an ordinary resolution added considerably to the earlier part of the clause. Now that a director can be dismissed by ordinary resolution the same effect is produced by the provision

[8] [1952] 1 Ch. 637.

[9] The exact effect of s. 20 is still in doubt but it seems clear that the Articles can have no direct contractual effect except as stated: see *Beattie* v. *B.* [1938] Ch. 703, C.A.

[10] *Swabey* v. *Port Darwin Gold Mining Co.* (1889) 1 Meg. 385, C.A., *Allen* v. *Gold Reefs of West Africa* [1900] 1 Ch. 656, *Re T. N. Farrar, Ltd.* [1937] Ch. 352.

[11] The learned judge conceded that if they were subsequently altered so as to include a power of dismissal the managing director would have a claim: *Southern Foundries* v. *Shirlaw* [1940] A.C. 701, H.L.

[12] *i.e.*, those italicised in the quotation above.

(which is retained) that the appointment "shall be automatically determined if he cease from any cause to be a director." On Harman J.'s argument any service agreement, even if expressed to be for a fixed term, must be deemed to be subject to the exercise of this overriding power. Under articles such as these the company can always get out of any service agreement (but, of course, can hold the unfortunate managing director to it) provided the company goes about it the right way. The directors must not purport to sack him, for article 107 expressly provides that *their* power to revoke his appointment is "subject to the terms of any agreement entered into in any particular case." They must convene a general meeting [13] and, if at that meeting a resolution is passed by a simple majority dismissing the director from his directorship, he will (if Harman J. is right) have his service agreement automatically determined without any right to damages.

This result is startling, for although many well-drawn articles expressly amend the wording of Table A to make it clear that cessation of office on ceasing to be a director is subject to the terms of any agreement,[14] it is probably true that quite as many adopt Table A or are on the same terms. The Court of Appeal refrained from expressing any concluded opinion on this point and the dictum of Swinfen Eady L.J.,[15] on which Harman J. mainly relied, was admittedly *obiter*. Having regard to the express terms of section 184 (6) it seems unlikely that the interpretation adopted was in accordance with the intention of the draftsman; on the contrary, subsection (6) seems to have been inserted expressly for the purpose of circumventing the decision in *Bluett* v. *Stutchbury's, Ltd.*,[16] and, if so, it seems unlikely that its result would have been intentionally retained under Table A. Indeed, Table A, on the learned judge's interpretation of it, is shockingly misleading, for it purports to confer power on the directors to fix the terms of a managing director's service agreement whereas in reality it prevents the directors from fixing the tenure, which is probably the most important term of all. And if his interpretation is right, it is certain that many dismissed managing directors have been awarded compensation when they had no right to it.[17] Another anomaly is that the position seems to be different if the director is not

[13] Giving "special notice" and complying with ss. 142 and 184.

[14] *Cf. Palmer's Company Precedents*, 16th ed., Pt. I, p. 604.

[15] In *Nelson* v. *James Nelson & Sons* [1914] 2 K.B. 770, C.A. at p. 779.

[16] (1908) 24 T.L.R. 469, C.A. This case apparently decided that an appointment by the directors of one of their number to be managing director under a clause analogous to Table A automatically determined, irrespective of the contract, if the managing director failed to secure re-election as a director. The exact grounds of this decision are not clear and Lord Porter in *Southern Foundries* v. *Shirlaw*, [1940] A.C. at p. 743, clearly felt doubts about its correctness.

[17] Even in the leading case of *Southern Foundries* v. *Shirlaw*, *supra*, although the wording differed from Table A it is by no means clear that grammatically the words "subject to the provision of any contract" qualified the whole of the article.

appointed managing director under article 107 but to another office of profit (secretary, consultant or the like)[18] under article 83 (3). In that event his express contract will not be ended by his removal from his directorship, and if the contract provides that he shall continue to be a director so long as he retains the position it would appear that he will have a claim for damages under section 184 (6) if his directorship is terminated. There can be no reason why a managing director should be treated more harshly than any other service director.

In the light of these considerations, it is to be hoped that Harman J.'s decision will be reconsidered. A case could be made for the view that all directors' service agreements should require the consent of the company in general meeting, but it is difficult to support the view that the directors alone can appoint and fix terms, but that despite these terms the company can dismiss without compensation. In the meantime, managing directors will be well advised to consider their positions. They should not enter into long-term service agreements unless the articles are properly worded so as definitely to afford them security of tenure. If they have already done so and the articles are in accordance with Table A they can only keep their fingers crossed or ask the company in general meeting to ratify their agreements and waive any limitation on the directors' powers under article 107.

L. C. B. G.

Inducing or Procuring Breach of Contract

Thomson v. *Deakin* [1952] Ch. 646[1] is a decision of importance and some difficulty. In the tort field of inducing or procuring breach of contract it must be regarded as a leading case.

Affidavit evidence alone was before the court; and the limited nature of the evidence imposed certain restrictions on the legal discussion. But, within the limits of the evidence, the relevant facts were that D. C. Thomson, Ltd., printers and publishers, had, since the General Strike, 1926, tried to exclude union labour from their personnel. Despite a written undertaking that each employee had to sign not to join any union, between 70 and 80 had secretly become members of the National Society of Operative Printers and Assistants (Natsopa). In March, 1952, one of them was dismissed.

[18] *Quaere*: can the effect of the case under discussion be avoided by purporting to appoint a director as " manager " under art. 83 instead of " managing director " under art. 107? A director who manages one branch of the business can be distinguished from a managing director, but hardly if he manages all branches.

[1] The treatment by the Court of Appeal of the application of law to the circumstances of each defendant's case is inadequately reported in the *Law Reports*. I have, therefore, referred where necessary to the report in [1952] 2 All E.R. 361.

He consulted Briginshaw, general secretary of the union, on the dispute. The latter sought to mediate with D. C. Thomson, Ltd., but was apparently refused an interview. Whereupon, Natsopa decided to make an issue with the plaintiffs of the right of their workers to join the union of their choice. This took the form of exerting multiple pressures on the business of the plaintiff company until it should agree to recognise the right in question. First, the Natsopa employees of the plaintiffs came out on strike. Then, Briginshaw, by speech, letter, circular and press statement, began to rally the entire trade union movement in Natsopa's support, with a view to stopping the plaintiffs' business by (inter alia) cutting off his supplies of raw materials, including paper from the Bowaters organisation. One circular ran : " We declared the firm of D. C. Thomson-Leng . . . to be ' black ' to every trade unionist in Britain, and in accordance with the unanimous resolution of the T.U.C. . . . on this matter last year, anticipated the full support of every affiliated trade unionist in our fight."

Deakin, general secretary of the Transport and General Workers' Union, in response to Briginshaw's appeal, asked Intin, regional secretary of the T. & G.W.U., to give such assistance in the dispute as the union properly could, without instructing that union members were not to handle or move paper for delivery to the plaintiffs. Wood, trade group secretary in the T. & G.W.U., who was working in close conjunction with Intin, telephoned one of Bowaters' transport supervisors and said that, as one of the plaintiffs' works were being picketed, it would be " unwise " to send any more paper to the plaintiffs. Intin telephoned Bowaters' transport manager and " advised " him not to ask his men to carry anything to the plaintiffs. Further, the shop steward at Bowaters, acting on the instructions of the local committee of union men, told the transport supervisor of the committee's resolution that, in view of what was happening, the men would be unwilling to handle the plaintiffs' newsprint. Bowaters yielded to these views and did not, after April 28, give any further orders for lorries to be loaded for or driven to the plaintiffs' works, thereby breaking their contract of sale with the plaintiffs.

Morrison, too, general secretary of the National Union of Printing, Bookbinding and Paper Workers' Union, responded to Briginshaw's appeal. On or about May 8, he sent circulars to his union's branches, one of which " probably " reached the branch at Bowaters. It included the words: " In these circumstances, we obviously have to play our part. Our people employed by London and also provincial wholesale distributors, will not handle any of Thomson's publications until the dispute has been settled. Our colleagues employed in paper mills making paper for Thomson's have responded magnificently." On May 12, the local union members at Bowaters, who were responsible for loading paper on to Bowaters' vehicles, decided not to load vehicles bound for the

plaintiffs. However, as Bowaters had already chosen not to resist union pressure and gave no orders after April 28 for paper to be loaded for or driven to the plaintiffs, neither Bowaters' drivers nor their loaders were forced to break or terminate their contracts of employment with Bowaters.

In these circumstances, the plaintiffs moved the court for an interlocutory injunction to restrain the defendants from cutting off their supplies of materials coming from organisations with whom the plaintiffs had contracted. The injunction was sought, before the Court of Appeal, on the grounds of conspiracy or inducing or procuring breach of contract, but, on the facts, only the latter ground could be seriously pressed.

The heart of *Thomson* v. *Deakin* is to be found in the judicial consideration of what amounts to "inducing" or "procuring" a breach of contract, generally, and, more particularly, in the case of trade disputes of the kind there involved.[1*] As a matter of general proposition, the court laid down that the tort may be committed in three main ways: (i) by directly inducing a party to break the contract, (ii) by procuring a breach directly, as, *e.g.*, in *G. W. K.* v. *Dunlop* (1926) 42 T.L.R. 376,[2] and (iii) by procuring a breach indirectly, *i.e.*, by "inducing" an independent third person, or persons, most commonly the servants of one contracting party, to cause the breach in question by a legally wrongful act (at 677–9, 694–6).

(i) "Induce directly": the precise degree and kind of verbal and circumstantial pressure necessary to constitute "inducing" a party to break his contract remains in law without clear definition. It seems to depend ultimately on the facts of each case. However, in trade dispute cases, so much is plain: when a union official simply informs dockers that the master of the barge they are loading has no union ticket and they then without more stop work in breach of contract, it is not a common law "inducement": *Scrutton's, Ltd.* v. *Lewis* (Citrine, *Trade Union Law*, 444); but it is when a union orders its men out on strike in breach of their contracts: *S. W. Miners* v. *Glamorgan Coal* [1905] A.C. 239; *Smithies* v. *National Association of Plasterers* [1909] 1 K.B. 310. Warning or informing an employer that his union men will strike if he does not dismiss a certain employee, or terminate a certain contract with a third party, as a consequence of which the contract with the employee or third party is broken without the need to resort to a strike, cannot be said for certain to constitute a common law "inducement," as the authorities stand.[3] Be this as it may,

1* The divergent views of the court regarding the requisite proof of knowledge of the particular contract on the part of the defendant should also be noted: [1952] Ch., at 687, and at 698, 702.

2 Which might also be termed procuring a breach indirectly through means other than the acts of independent third persons.

3 It is certainly not a "coercion" or "threat": *Santen* v. *Busnach* (1913) 29 T.L.R. 214; *Hodges* v. *Webb* [1920] 2 Ch. 70; *White* v. *Riley* [1921] 1 Ch. 1. According to *White* v. *Riley*, it is not an "inducement." But the

in *Thomson* the caution given to Bowaters by the defendants, Wood and Intin, fell short—on the evidence—of an ultimatum of the type just mentioned; and their communications were held not to have "induced" the breach in question (at 686; [1952] 2 All E.R. 382).

(ii) "Procure directly": this mode of the tort was not at issue in *Thomson*, but the court referred *obiter* to an important aspect of it, *viz.*, whether the method by which the breach is directly procured must in itself be a legally wrongful act. Morris L.J. suggested that it must: "The breach of contract must be brought about or procured or induced by some act which a man is not entitled to do, which may take the form of direct persuasion to break a contract or the intentional bringing about of a breach by indirect [4] methods involving wrongdoing" (at 702). It may be added that the decided cases as well as those hypothesised in *Thomson* all envisage a legally wrongful act, like trespass to chattels (*G. W. K.* v. *Dunlop, supra*), fraud (*National Phonograph* v. *Edison-Bell* [1908] 1 Ch. 335), false imprisonment (*per* Jenkins L.J., at 694–5), conversion, assault and battery or "kidnapping" (*per* Morris L.J., at 702).[5]

(iii) "Procure indirectly": the general legal formulations of Lord Macnaghten in *Allen* v. *Flood*, of Lord Macnaghten again and of Lord Lindley in *Quinn* v. *Leathem*, of Atkin L.J. in *Ware and De Freville* v. *M. T. A.*, of Lord Dunedin in *Sorrell* v. *Smith*, and of Viscount Simon in *Veitch's Case* [6] have, in *Thomson*, been restated as a sharply focussed rule for the purposes of the tort under discussion. The rule is that where a third party causes a breach of contract through the acts of the servant or servants of the contract breaker (or the acts of other independent third persons), the third party will not be liable for "procuring" a breach of contract unless he "induced" the servants to commit acts that are themselves legally wrongful (at 678, 679, 696, 702). Generally, in trade dispute cases, such acts will be breaches of contracts of employment. The major aspects of the rule were applied in *Thomson* as follows:

(*a*) The breach of contract or other legally wrongful act must

pre-1906 cases of *Temperton* v. *Russell* [1893] 1 Q.B. 715 and *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 732, are to the contrary, the former being perhaps distinguishable on its facts. In *Thomson*, Jenkins L.J. reiterated the well-established rule that, "acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they were done with the object and intention of bringing about such breach" (at 693). The general rule, of course, begs the question whether an ultimatum of the kind above mentioned is an act lawful in itself.

[4] Morris L.J. here clearly referred to acts of both direct and indirect procurement as I have called them.

[5] *Cf.* too, the hypothetical sale of goods case put by Evershed M.R. at 680.

[6] Collected in *Thomson*, at 682–5, 691–3.

have been "induced" (or, possibly, "procured," if the circumstances so warrant), in accordance with the technical meaning this expression has acquired. Thus, "general exhortations issued in the course of a trade dispute, such as 'Stop supplies to X,' 'Refuse to handle X's goods,' 'Treat X as black,' and the like" (at 698) do not constitute "inducing" any legally wrongful act that follows, if the objects advocated could have been achieved by lawful means, *e.g.*, by giving proper notice under an employment contract: "a person who advocates the object without advocating the means is [not] to be taken to have advocated recourse to 'unlawful means'" (at 697–8). It should, I think, be noted that these statements of Jenkins L.J. are not normally appropriate to trade union action at the local level, but only at the higher levels. At the local level, there will normally be an order, in accordance with the local committee or meeting's resolution to stop work, and this order will, if breaches of contract follow, amount to "inducing" such breaches: *S. W. Miners* v. *Glamorgan Coal*, *supra*. Be this as it may, the court in *Thomson* held that the defendants, Deakin, Briginshaw and Morrison had not "induced" Bowaters' union men because they had only "appealed" and "exhorted" ([1952] 2 All E.R. 372–3, 381–2).

(*b*) As the evidence showed that the union loaders and drivers had not broken their contracts with Bowaters, because the latter had, consulting their own best interests, yielded without a struggle, it followed that the loaders and drivers had not committed any legally wrongful act at all. Therefore, the defendants, Deakin, Briginshaw and Morrison were, on this further ground, held by the court not to have "procured" the breach of contract between Bowaters and the plaintiffs (at 685; and [1952] 2 All E.R. at 382, 385).

But, what if Bowaters had resisted union pressure? In that event the unions might have forced the issue by calling out Bowaters' loaders and drivers. If this were done lawfully, *i.e.*, by giving due notice, no tort, in the light of the above rule, would have been committed. This rule clearly, therefore, encourages an element, which might be called an educational element of orderliness in strike procedure, at least where the Trade Disputes Act, 1906, s. 3, does not apply. The delay involved by giving notice in the case of industrial workers is generally insignificant, often no more than a single hour.[7] The much longer notices required of salaried employees, like bank clerks, teachers or civil servants, would tend to delay considerably lawful strike action by the latter at common law, though such action would frequently be legalised under s. 3 of the 1906 Act.

If, on the other hand, the strike entailed breaches of contracts of employment, then the local officials ordering the strike would

[7] *Quaere*: whether any notice at all is required if the lawful notice in question is very short? *Cf.* Evershed M.R. on a slightly different point, at 688.

have been personally liable for "procuring" the breach between Bowaters and the plaintiffs, but not the higher officials, unless they had changed from exhortation to specific instruction (or incitement) to strike. On this, it was argued that all the union officials would in any case have been protected by the first limb of the 1906 Act, s. 3, which runs: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment." The argument was that if the breach of contract of employment was "not . . . actionable" it could not be said to be a legally wrongful act within the meaning of the rule regarding indirect procurement of a breach of contract. The Master of the Rolls alone considered this argument and rejected it, on the ground that the breach would still be "an unlawful act" though not actionable (at 687). Until there is further authority, the point must, with respect, be regarded as still open.

So far as *defences* to the tort of inducing or procuring a breach of contract are concerned, the legal statements in *Thomson* impinge most importantly upon the defence of "justification." Justification, in the case of the present tort, may be either common law, which was not material in *Thomson*, or statutory. Two possible heads of statutory defence were considered in *Thomson*. The one, based on the first limb of the 1906 Act, s. 3, has already been discussed. The other was founded on the second limb of section 3: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only . . . that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

The Master of the Rolls alone took this point too, and rejected the argument that the provision would have protected the defendants in *Thomson* had they in fact and in law "induced" Bowaters' men to break their employment contracts (at 688–9). In addition to the slight authority the Master of the Rolls cited, it is interesting to observe that *Citrine on Trade Union Law* considers that the second limb of section 3 was inserted *ex abundanti cautela* (at 453). If, however, this provision ought, as the Master of the Rolls suggested, to be construed "by having due regard to the state of the law at the time the section was enacted" (at 688), then the decision in *Temperton* v. *Russell* (to the extent that it was not disapproved in *Quinn* v. *Leathem* [1901] A.C. 509, 535) should be taken into account. The construction of section 3, here again, remains technically open.

Thomson also raised the important question of who can properly be sued in cases of this sort. The Master of the Rolls did not favour the possibility of an action against the workmen themselves, assuming them to have broken their employment contracts (at 688).

It was further argued that the actual defendants in *Thomson* were not suable because, under the 1906 Act, s. 4, they were "in truth, officials of the union" (at 689). However, while section 4 covers an action against a trade union in tort or a representative action against a member or official on behalf of the trade union, it does not protect the actual tortfeasor against *personal* liability (*cf.* Citrine, *op. cit.*, 454); and this was the position maintained in *Thomson* (at 689). In practice, if damages were awarded, in such a case as the present, against a union official in his private capacity, reimbursement would very likely be made to him by his union either out of union funds or (which comes to much the same thing) out of the pockets of union members. In this way, the protection given by section 4 might be in some danger of being impaired. Again, a union official's freedom of action may tend to be hindered if the performance of his duty in supporting or leading proper strikes may expose him to common law liability. It was perhaps considerations of this kind that underlay the concern expressed at the last T.U.C. about the gap in section 4, which *Thomson* had merely underlined (*The Times* newspaper, September 2, 1952).

C. Grunfeld.

Loss of Consortium—An Obituary?

Lord Macmillan said, in *Read* v. *Lyons*[1]: "Your Lordships' task in this House is to decide particular cases between litigants, and your Lordships are not called upon to rationalise the law of England. That attractive if perilous field may be left to other hands to cultivate." The House of Lords, in *Best* v. *Samuel Fox & Co., Ltd.*,[2] likewise declined to rationalise the law of England and viewed with detached indifference the existence of a patent anomaly in the common law.

Lord Porter, in *Best's Case*, voiced the sentiments of his learned brethren (Lords Goddard, Oaksey, Morton of Henryton and Reid) when he said (at p. 395): "I do not think it possible to say that a change in the outlook of the public, however great, must inevitably be followed by a change in the law of this country. The common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection."

The "change in the outlook of the public" refers, of course, to the modern view that men and women (and husbands and wives) should enjoy equal rights and duties in law. While "public opinion" has accepted this equation as axiomatic, English common law still reflects in its tenets the relationship between the sexes which appertained in feudal times.

[1] [1947] A.C. 156 at p. 185.
[2] [1952] 2 All E.R. 394.

The present law, as finally established in the instant case by the House of Lords,[3] is that while a husband can claim damages for loss of consortium if a third person negligently injures his wife, the wife has no such claim if the third person negligently injures her husband.

The reasons for rejecting Mrs. Best's appeal can be stated summarily as follows:

(i) The "enticement cases," which establish that a wife can sue a third party who entices away her husband are *sui generis*. "They are not authorities for the conclusion that in all cases of tort resulting in injury to the one which deprives the other of his or her consortium the party deprived can sue the wrongdoer. . . ." (Lord Porter, at p. 395). These enticement actions are based "on the well-established legal principle that the violation of a legal right committed knowingly is a cause of action" (Lord Goddard, at p. 397).

(ii) Enticement actions cannot even be used by way of analogy to establish a wife's right to claim for loss of consortium through negligent interference by a third party. It may be anomalous that a distinction should be drawn between these two classes of cases but the common law does not profess to be logical.

(iii) As between husband and wife, the husband's present established right of action for loss of his wife's consortium is an anomaly and there is no good reason for extending it by granting to the wife a similar right. Lord Porter (at p. 396) said: "If the change is to be made I should prefer to abolish the husband's right rather than to grant the like remedy to the wife." It should be noted that when Darling J., in 1923, gave to the wife, for the first time, a remedy in damages against a woman who had enticed away her husband, he aptly remarked that: "The present case raised the question whether sauce for the gander was not sauce for the goose."[4] When, in 1952, an analogous principle of equality arises, the unanimous opinion of the House of Lords is that equality should be achieved by denying sauce to all!

In the Court of Appeal, Birkett L.J. was alone in holding that "today . . . the wife is entitled to bring an action when she has been deprived of her consortium by the negligent act of a third person" (C.A., at p. 124). Cohen L.J. and Lord Asquith of Bishopstone, considered that the husband's right of action was anomalous and should not be extended. Therefore, on this point, the majority in the Court of Appeal is upheld by the House of Lords while Birkett L.J. is overruled. But the Court of Appeal was unanimous in the view, that even assuming the wife had a right of action, she could not succeed where the alleged loss of consortium

[3] Confirming Croom-Johnson J. at first instance [1950] 2 All E.R. 798, and the Court of Appeal [1951] 2 All E.R. 116, see 14 M.L.R. 84 and 15 M.L.R. 246, respectively.

[4] *Gray* v. *Gee*, 39 T.L.R. 429.

was only partial. Birkett L.J.'s words were: "Consortium . . . is one and indivisible. The law gives a remedy for its loss, but for nothing short of that" (C.A., at p. 125). If the House of Lords had been satisfied in resting its decision merely on the denial of any right of action to the injured wife, this heretical distinction between partial and total loss would probably have been ignored in the future. Nevertheless, the House of Lords thought fit to add their comments on this separate question, and thereby revived the controversy in no uncertain manner.

Lord Porter expressed a "tentative opinion" on the matter (at p. 396), *viz.*: "I find it difficult to draw the boundary between what is and what is not loss of consortium or to divide it into its component parts. But, having regard to the opinion which I hold on the other contention, it is not necessary to come to a final decision on this point in the present case."

Lord Goddard, while acknowledging that the matter can now only affect a *husband's* claim, also aligned himself with the Court of Appeal on this point. He suggested (at p. 399) that the prolonged absence abroad of one spouse through professional reasons or the call of duty, the fact that one party becomes a permanent invalid, the loss of affection by one party though the spouses continue living together as man and wife, the loss of sexual relations through age, illness or disinclination—none of these circumstances would affect the consortium. "In truth, I think the only loss that the law can recognise is the loss of that part of the consortium that is called servitium, the loss of service . . ." (at p. 400). Lord Porter meant much the same thing when he pointed out that in claims brought by a husband for loss of consortium by negligent interference, the assessment of damages is practically confined to the cost of medical attention and the payment for household services which the wife, on account of her injuries cannot perform, "and little, if any, attention is paid to a loss of consortium which involves other considerations beyond these two" (*ibid.*, at p. 396). It is respectfully suggested that if these two distinguished opinions are correct, the term "consortium" has no longer any legal connotation, and it would lead to greater clarity of thought if "servitium" took its place as a word of art in these actions.

Lord Reid (with whom Lord Oaksey concurred) denied that consortium was an abstraction; he preferred to consider it as "a name for what the husband enjoys by virtue of a bundle of rights some hardly capable of precise definition." Therefore the destruction of any one of these rights would entitle the husband to damages for his loss. "I do not think that it is open to doubt," he said, "that an impairment of a wife's capacity to render assistance to her husband was enough to found an action. . . . I have seen nothing to lead me to think that the destruction of the

wife's capacity for sexual intercourse should not be regarded as such an impairment " (at p. 401).

Lord Morton of Henryton held the balance between these two opposing views by refusing to express an opinion. " That question does not arise in the present case, and it may arise for decision hereafter on a claim by a husband for a partial loss of consortium " (at p. 400).

It would thus appear that while settling one question, *viz.*, that the wife has no claim for loss of consortium through the negligent interference of a third person, a second equivocation has now been raised by the two appellate courts, *viz.*, whether the *husband* can claim for mere impairment, as distinct from total loss, of consortium.

One can only hope that the whole question of actions in tort for loss of consortium, together perhaps with the equally vexing anomaly of a spouse's liability for ante-nuptial torts,[5] will be deemed worthy of investigation by the Law Revision Committee, now happily reconstructed.

ERIC C. E. TODD.

CHARITABLE TRUSTS

THE recent decision of Vaisey J. in *Re Spensley's Will Trust* [1952] 2 All E.R. 49, so far as it bears on the question of the *cy-près* application of a charitable gift, represents a remarkable extension of the accepted rules in this field—indeed such an extension as to cast doubt on the correctness of the decision itself.

The facts were as follows: the deceased H.S. died in 1938 leaving the Manor of W. and the advowson belonging to it to the National Trust upon trust for the deceased's sisters for their lives, and after the death of both upon trust for the High Commissioner for Australia for use as a country residence. The will then proceeded, " should the Government of Australia refuse this bequest . . . then for such other uses preferably for some purpose in connection with Australia as the said National Trust and my sister E. if then alive may jointly decide." The testator went on to express the wish that the living of W. be held by men who had experience in Australia, and that the manor house and curtilage be kept intact and maintained out of the proceeds of sale of other property.

In the events which in fact took place E. had sold the manor house and advowson in her capacity as tenant for life, and both the National Trust and the High Commissioner had renounced and disclaimed any interest in the estate; the questions before the court were: (1) were the trusts of the will (so far as set out above) charitable; and if so (2) what disposition should be made to give

[5] See *Baylis* v. *Blackwell* [1952] 1 All E.R. 74, at 77 (McNair J.), and the critical comments of Profesor O. Kahn-Freund, 15 M.L.R. 133, esp. 148 *et seq.*

effect to the trusts? The learned judge held that, as the gift was in the effective disposition of the National Trust, which was admittedly a charity, it had been therefore dedicated to charitable purposes. He accordingly directed a scheme *in pari materia* with the purposes of the National Trust.

It is sufficiently agreed that in such circumstances it must be demonstrated both that the initial gift is charitable and that a general charitable intention is implicit in the gift. If so, a *cy-près* application may be made to purposes as near as possible to those of the original gift: *Mills* v. *Farmer* (1815) 1 Mer. 55; Tudor, *Charities*, 5th ed. (1929), pp. 149 *et seq*. Observe then this case.

The vital preliminary question is always, who is the beneficiary? Vaisey J. held in effect that the beneficiary was the National Trust, quoting as authority the case of *Re Flinn* [1948] 1 All E.R. 541. In that case a gift was made to the Cardinal Archbishop of Westminster "for such purposes as he shall in his absolute discretion think fit." Jenkins J. held that the gift was made to the Archbishop *virtute officii* and was therefore charitable.

Vaisey J. in the present case inferred from *Re Flinn* that an effective power of disposition is in all cases tantamount to a gift to purposes *in pari materia* with those of the appointing charity; it is, however, submitted with respect that that decision was far from supporting such a proposition. The material points in the decision of Jenkins J. were: (1) that the Archbishop had been invested with a free discretion in the application of the gift; and (2) that in such circumstances the donee was bound as trustee to apply the gift to the purposes of his office—namely, diocesan purposes for the advancement of religion. This is amply supported by authority. It does not go nearly so far as to suggest that where charitable purposes have been pointed out by the testator, the fact that the trustee has a power to select entitles the trustee to be regarded as a beneficiary. To say this would be like converting a special power of appointment into a general power.

Assuming, however, that the inference of Vaisey J. from the decision in *Re Flinn* was a correct one, it is nevertheless submitted that it could have no bearing on the present case. First, the National Trust could not be said to have an "effective" power of disposition since it was bound to join with the testator's sister (who was alive at all material times) in making the appointment. Secondly, the field of appointment was not unfettered but had been specifically limited by the testator to "other uses, preferably for some purpose in connection with Australia"—declared trusts which bore no relation to the National Trust. Thirdly, it is at least questionable whether the purposes were charitable (a point to be dealt with shortly).

Even then, assuming that *Re Flinn* did mean what the judge took it to mean and assuming also that the decision was applicable

to the present case, a fundamental obstacle remains to be surmounted. The *cy-près* principle relates to the redisposition of a gift where the prescribed beneficiary is unable to enjoy it. The National Trust, however, was not the prescribed beneficiary and the judge explicitly says so ([1952] 2 All E.R. at p. 58): "I do not think that the testator intended to give the National Trust a free hand so that it could . . . put the money in its pocket." But unless the National Trust could put the money in its pocket, it was not beneficially entitled; and unless the National Trust was beneficially entitled the *cy-près* application ought not to have been made *ejusdem generis* with its purposes. The gift must be applied *cy-près* the beneficiary's objects and not *cy-près* the trustee's objects.

The proper beneficiary was in fact "purposes in connection with the Commonwealth of Australia." The whole tenor of the will shows that it was Australia which was intended to benefit, and not the National Trust (which was not referred to in the will otherwise than as trustee).

As there was an alternative gift in the event of the High Commissioner's refusal of the house, it was the alternative gift "to other uses, preferably for some purpose in connection with Australia" which was to be construed. The discretion afforded to the trustees, however, was so wide that unless the gift could be said to be charitable it must necessarily fail for uncertainty.

The cases on "public purposes" hardly support the suggestion that the original gift even, that for the High Commissioner, is charitable. See, for example, *Re Strakosch* [1949] Ch. 529, C.A., and cases there cited; and compare *Att.-Gen.* v. *National Provincial Bank, Ltd.* [1924] A.C. 262. If then the original gift cannot be supported as charitable, how much less can the vague term "purposes in connection with Australia"? Moreover, it need hardly be said that the fact that the trustee is a charitable organisation cannot make a charitable purpose of one which would not otherwise be charitable.

But even if these purposes had been charitable, it is nevertheless submitted that the gift should have failed in any event under the principle of *Morice* v. *Bishop of Durham* (1804) 10 Ves. 522. It was open to the trustees without breach of trust to apply any or all of the gift to non-charitable purposes so wide was their discretion. No question of *cy-près* could then possibly have arisen and the gift would have very properly fallen into residue.

HAMISH R. GRAY.

THE CROWN AND "PER QUOD SERVITIUM AMISIT." ARE POLICEMEN SERVANTS?

THE above topics were debated at length by the High Court of Australia in *Att.-Gen. for N.S.W.* v. *Perpetual Trustee Co., Ltd.*

[1952] A.L.R. 125. The court held that the Crown in right of N.S.W. could not recover damages in respect of loss of services of a police constable negligently injured by the driver of a motor vehicle. In N.S.W., as in all the Australian states, the police forces are centrally organised and controlled by Departments headed by a responsible Minister of the Crown. Otherwise their general duties and discipline are similar to those obtaining in Britain, and result from a combination of common law rules and statutory provisions. Six justices sat on this appeal and delivered separate opinions. These opinions deal with the major prior decisions in this field in Great Britain, Ireland, Canada and the U.S.A., and constitute a convenient source-book for almost every view that can be expressed concerning the scope and utility of the *per quod servitium amisit* action, the social and juristic character of service under the central government or "Crown" and the peculiar characteristics of military and police service in particular.

On an independent consideration, Dixon J. was for the plaintiff, but held for the defendant solely because the court had already, in *Commonwealth* v. *Quince* (1944) 68 C.L.R. 227, denied to the Crown the right to recover for the loss of services of members of the armed forces, whose relations with the Crown his Honour considered indistinguishable from those of a policeman; this raises a question of almost purely Australian interest concerning the circumstances in which the High Court of Australia should reconsider its own previous decisions. Williams J. disagreed with Dixon J.'s view on the question of *stare decisis*. Disregarding this aspect of the matter, the opinions can be grouped in support of the following propositions:

(1) The relationship of master and servant in private law, which carries vicarious responsibility and a claim to damages for loss of services, requires that "the power of direction residing in a person must belong to him for the purpose of enabling him to conduct his own affairs"; this cannot be asserted of the situation of the Crown in relation to any of its "servants." "It is . . . a mistake to try to force the relationships into which the Crown enters with its subjects for the conduct of (public) affairs into categories established in the domain of private law, which, by their nature and their history, are appropriate only to relationships between subjects" (Kitto J., with some support from Fullagar J.). On this view, the Crown cannot recover under this form of action for loss of services of any of its employees, and no special significance attaches to the nature of the duties of a policeman or a soldier. It should follow that there can be no vicarious Crown liability for the acts of its servants in the absence of statutory provision.

(2) The action *per quod servitium amisit* is a feudal relic which "has long since ceased to have any life or reality."

Looked at from the point of view of the scope of the duty of care in negligence (*e.g.*, in the light of *Bourhill* v. *Young* [1943] A.C. 92) it constitutes an illogical extension of that duty to masters of persons injured; if this extension is accepted, it should be carried further to cover the cases of partners, etc., who lose by the negligent injury in question. It is open to the courts to confine this inconvenient survival to the case of malicious seduction of dependent females (in the popular sense of " seduction "). On such a view, there can be no question that the Crown must fail in actions such as the present (Fullagar J.).

(3) " A police constable has always been an arm of the law and never a servant employed to do a master's bidding on all occasions and in any circumstances. His authority is original, and not derived from a master or exercised on behalf of one, but is exercised on behalf of the public." It follows that the Crown cannot claim an interest in his services sufficient to support the present action. This, however, is a different reason from that adopted for denying the Crown the right to recover in respect of loss of services of soldiers (Webb J., with some support from Fullagar and Kitto JJ.).

(4) Whatever may be the case with other types of Crown servants, policemen and soldiers have a " special relationship " to the Crown, dependent on conceptions of fealty or duty which have no analogy with the private law relationship of master and servant. In respect of such " servants," the Crown has no action for loss of services. *Commonwealth* v. *Quince* followed (McTiernan J. and, to the extent that he followed *Quince's Case*, Dixon J.).

(5) The history of the action *per quod servitium amisit* shows that it was intended to apply for the benefit of masters in respect of loss of servants in a manner which has no connection with modern notions of " proprietary interest," " contractual interest," " public versus private duty " or other such categories. The relationship between the Crown and its various servants or officers, whether soldiers, policemen or civil servants, is in all material respects identical with the kind of relationship between master and servant in general envisaged when the form of action arose. Hence the Crown should succeed in the present action (Williams J. and, in so far as he was prepared to reconsider the question, Dixon J.).

It is suggested with respect that the historical examination of this question by Dixon J. (since appointed Chief Justice) and Williams J. is convincing, and that their reasoning, together with the current of English opinion, might well result in the House of Lords eventually establishing for Great Britain what is now the

dissentient view in Australia. It is also suggested with respect that the analysis in terms of social utility and consonance with the general law of torts undertaken by Fullagar J. is equally convincing, and represents the view which an enlightened legislature would take. However, it may be suggested with respect that none of the justices gave sufficient consideration to a matter which is of much greater public importance than either the proper basis of "seduction" actions generally, or the power of the Crown (which it is not likely to exercise very frequently anyhow) to recover damages for loss of services: that matter is the basis and scope of vicarious liability of the public purse for the wrongful acts and breaches of contract of Crown servants. So long as there is any danger of the Crown's vicarious liability for its servants being treated as having a relation to its capacity to recover damages for loss of their services, it is certainly in the public interest that the latter claim should be admitted in order to cast no doubt on the scope of the former. This question has had a longer history in Australia than in Britain. Those familiar with it will applaud in general Kitto J.'s objections to forcing public law into the categories of private law, but they must add—what else could the courts have done? Our basic difficulty has been the almost total absence of any special system of administrative law, and the consequent inevitability of Parliament and courts relying heavily on the analogy of private law when creating the systems of government liability and rights essential in a social service state. On the whole, the public interest has been served by treating the peculiar relations between the public purse, Parliament, the Crown, and civil servants as if they incorporated the private law of master and servant, and injustice rather than justice has been served when the courts have attempted to introduce references to the peculiar nature of public service: see this writer's article, "Crown Liability in Tort and the Exercise of Discretions," in 1951 *Res Judicatae*, p. 14.

GEOFFREY SAWER.

WHEN CAN A MURDERER INHERIT?

ON account of the unusual facts as well as the problems it raises, the South African case of *Ex p. Steenkamp and Steenkamp*, 1952 (1) S.A. 744 (T) (noted in (1952) 69 *South African Law Journal* 136), is of more than local interest.

A man murdered both his parents-in-law. He was sentenced to life imprisonment. In their last will, executed some years before their death, his parents-in-law bequeathed their farm and certain movable property to the children, born or to be born, of the marriage of their daughter and her husband. At the time of the murder the spouses had two children, and a third child was *en ventre sa mère*. The third child was born a few months after the

murder and died when it was not quite six months old. The question which the court had to decide was whether the murderer could succeed *ab intestato* to the estate of his third child, which consisted, apparently, solely or mainly of the property which the child had inherited from its murdered grandparents—the parents-in-law of the murderer.

In Roman-Dutch law, as in other Romanistic systems of law, a murderer is "unworthy" to inherit from his victim. The court (Steyn J.) held that this rule did not prevent the murderer from succeeding to the heir of his victim. It was true that where the victim and his heir were *conjunctissimae personae*, that is to say, persons closely linked by the ties of relationship or marriage, a crime against one might render the murderer "unworthy" to inherit from either, but on the facts, the child's relationship to its grandparents was not such as to make them *conjunctissimae personae*.

The rule that no one may enrich himself by his own wrongful act forms part of the Roman-Dutch law, as it does of English law. Thus the question arose whether the murderer, though not "unworthy" to succeed to his third child, was precluded from inheriting that part of the estate of the child which the child had inherited from its grandparents. The court held that he was not so precluded. The direct legal cause of the murderer's enrichment was not the crime, but the birth and death of the third child. Accordingly, the court decided that the murderer could succeed to the whole estate of his third child.

In English law the doctrine of "unworthiness" does not apply, but it is well settled "that one who has feloniously killed another cannot succeed to that other's property either under a will or under an intestacy": *per* Farwell J. in *Re Pollock* [1941] Ch. 219 at 222. See further, *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; *In the Estate of Crippen* [1911] P. 108; *Re Sigsworth* [1935] Ch. 89. This rule clearly does not preclude the murderer from succeeding to his victim's heir, but the question remains whether he can take that part of the estate of his victim's heir which the latter has inherited from the victim. There seems to be no authority on this point in English law and one can only speculate as to what the answer would be.

The basis of the rule that a murderer may not inherit from his victim is public policy. As Fry L.J. said in *Cleaver* v. *Mutual Reserve Fund Life Association, supra*, at 156:

> "It is against public policy to allow a criminal to claim any benefit by virtue of his crime. . . . It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person."

There can be no doubt that if the murderer in *Steenkamp's Case* is allowed to succeed to the whole estate of his third child, he

derives a benefit from his crime. If he had not murdered his parents-in-law they would almost certainly have outlived his third child. But is this benefit the *direct* result of his deed? It is submitted that no hard-and-fast rule can be laid down, but that each case has to be decided on its own merits. Two hypothetical cases will illustrate this point. On the one hand, let us assume that A knows that he is the heir of B and that B is the heir of C. B is a a poor man, but C is wealthy. B falls seriously ill and is expected to die. A murders C in order to make sure that B, before his death, inherits C's estate. B dies shortly after the murder, having inherited C's estate. Can there be any doubt that A would be precluded from inheriting that part of B's estate which came to B from C? On the other hand, let us assume that the murder is not committed with any intention to benefit from it, and that the victim's heir dies long after the estate of the murdered man has become merged in his own estate and after he has had ample opportunity, should he have desired to do so, of willing his estate away from the murderer. It is suggested that in this case the causal nexus between the murder and enrichment would be broken and that the murderer would not be precluded from succeeding to the whole estate of the heir of his victim.

Steenkamp's Case lies somewhere between these two extreme cases, but it is respectfully submitted that the causal connection between murder and enrichment was still sufficiently direct so as to bring the case within the rule that a man may not benefit from his own wrongdoing. Since the victim's heir died shortly after the murder without capacity or opportunity of making a will of his own, the crime must be regarded in law as the cause of the enrichment.

H. R. Hahlo.

Editorial Note

Volume 14, at p. 511, listed decisions noted in the *Review* which had subsequently been considered on appeal but not further noted here. To this list should now be added:—

Benn v. *Kamm* [1952] 1 T.L.R. 57 (Vol. 15, p. 289) affirmed by Court of Appeal [1952] 1 T.L.R. 783.

Earl Fitzwilliam's Wentworth Estates Co. v. *Minister of Town and Country Planning* [1950] 2 All E.R. 765 (Vol. 14, p. 73) affirmed by Court of Appeal [1951] 1 All E.R. 982 and by House of Lords, *sub nom. Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Housing and Local Government* [1952] A.C. 362.

This list was compiled as at the end of the Long Vacation, 1952.

REVIEWS

PARLIAMENT: A SURVEY. Edited by LORD CAMPION. [George Allen & Unwin, Ltd. 1952. 296 pp. 22s. 6d.]

THIS collection of 18 essays results from the formation of a Group, under the chairmanship of Mr. Craik Henderson, brought together on the initiative of the Department of Extra-Mural Studies of London University. A series of 10 lectures, given in 1950, is its basis. Amongst the members of the Group who did not contribute to this volume (a second collection is hinted at) were Mr. Ernest Brown, Sir Henry Banbury, Commander Stephen King-Hall, Professor J. H. Morgan, Mr. J. P. Plamenatz and Lord Soulbury.

The British Parliament is an institution of some antiquity but it is not so old as the Executive and a survey of Parliament is a survey of its relations with Governments. It is implicit in almost all of the essays in this volume, and explicit to the point of explosion in some, that Parliament is too weak and Governments too strong. Lord Campion in the first essay on Parliament and Democracy looks back nostalgically to the period between 1832 and 1867 as "the Golden Age of Parliament." It was, he says, "an age of reason in politics, of individualism and *laisser-faire*. Power was reasonably balanced between the executive and the legislature; the problems of the period were chiefly political—of a nature within the competence of the average member of the House of Commons. The country 'looked up to' the House of Commons, was satisfied with the kind of representation the governing classes gave it, and liked it the better for being ornamental." It depends, one suspects, on what is meant by "the country." These vital 35 years saw, in fact, the origins of the change. In this period, Governments began to put forward modest legislative programmes, party discipline began to be exerted, proposals for social reforms were adopted, drafting was becoming a specialised and Governmental function and if 1848 did not see a revolution in England, it saw the passing of the Public Health Act. If it was a Golden Age for Parliamentary power, the gold was of a sunset.

The change over the past 130 years from aristocracy to democracy which has given Governments more power and resulted in their increased authority through Parliament has frequently led to the demand that the dangers should be guarded against by strengthening the House of Commons. But the suggestions which have been put forward generally seek, sometimes unconsciously, to stand the Constitution on its head. Professor Brogan in a comparative essay points to the advantages and disadvantages of adopting a system of Parliamentary committees like that either of France or of the United States of America. Save for one short period, this country has never been governed by Parliament through the medium of committees, and, unless we are prepared to change our traditional method, any increase in the power of Parliament must stop short of administration. Mr. Craik Henderson purports to write an essay on the Dangers of a Supreme Parliament and is at once involved in this confusion. Thus the title of his essay is mistaken; he is, in fact, writing on the Dangers of a Supreme Government. So he can write: "A minority Party may question Ministers, may criticise but they cannot control in the ordinary case a Government with a reasonably large majority." Of course they cannot. Why should they? How would the affairs of the country be conducted if they could? He is worried because a Government could constitutionally suspend sittings, arrest Ministers, do away with habeas corpus and freedom of speech and "establish virtually a dictatorship." Of course they could. But his remedies (stronger Second Chamber, written constitution and a system of referenda)

would not stop them. If the electorate return to power a revolutionary party, they will presumably get a revolution. The safeguards lie deeper than Mr. Henderson has probed. There are more things in heaven and earth than are dreamt of in his philosophy.

The central problem is again tackled by Sir Arthur Salter. He puts forward several specific and interesting suggestions for controlling the Cabinet and for its more efficient working but has little hope that they will be effective unless there is a great reduction in the mass of work falling upon the central government. It is a pity that he had no space to elaborate his suggestion that there should be more decentralisation to local authorities. Sir Arthur would also like to see unofficial committees of Members formed for each main group of subjects which Ministers would be expected to attend. Ministers would explain their problems and their policy and there would be discussions. The official debates would then be "less discursive and uninformed than they are at present." This suggestion is a valuable example of the way in which Parliament can influence Governments without attempting to usurp the functions of the Executive though there is the danger of restricting the critical function of Parliament by "off the record" disclosures. Again, in a second essay (on Parliamentary Procedure), Lord Campion returns to the relationship between the two institutions. But this essay is neither so controversial nor so interesting as the memorandum and evidence which he submitted to the Select Committee on Procedure in 1946. Mr. F. W. Lascelles attempts to deal with the problem of a Second Chamber "not from the point of view of party politics." In the result, his essay ends with the question with which it could have begun: should the second house be merely a "useful" chamber or should it have power and authority as a balancing factor in the Constitution?

Professor A. L. Goodhart considers Parliamentary control over Nationalised Industries. He puts his emphasis on the indirect Parliamentary control exercised over the responsible Minister. He finds, rather surprisingly, that Questions on serious derelictions of duty and the occasional debates are adequate "from the negative standpoint" and he does not favour a Select Committee. On the "positive" side, Professor Goodhart finds no answer to the question whether Parliament can somehow ensure that the industries are run as efficiently as possible. It would have been interesting to the central problem of the relationship of Parliament to the Executive branch (here a semi-independent Board) to examine how far the efficiency of a Department is affected by the complete responsibility of its Minister to Parliament and by the knowledge of the whole Government that its continuance beyond, at most, five years depends in part on the general reputation for efficiency acquired by Ministers. The extent of Parliamentary influence depends finally on those factors neither of which applies to the members of nationalised industries in the same way. It may therefore be impossible for Parliament to exert a comparable influence.

The two outstanding essays of this principal group are those by Mr. L. S. Amery and Mr. G. M. Young. The mistake of urging that Parliament should be so strong that it can, by means of committees, take over much of the burden of government finds an equally fallacious theoretical basis in the belief that the Constitution is based on a system of delegation from the people to Parliament which then instructs the Executive. This is a heresy begotten, in modern times, by Bagehot and sustained in the sickness of its later life by Sir Ernest Barker and others. Mr. Amery seeks to put it out of its misery. "Our system," he writes, "is one of democracy, but of democracy by consent and not by delegation, of government of the people, for the people, with, but not by, the people." It is the Government which has the power and the duty to govern; the vital function which Parliament has to perform must be seen as correlative to this. Mr. Young's essay is a classic "last chapter" to a collection. Every reader will find much to disagree with and much to applaud. Mr. Young recognises that finally Parliament, so long as it continues to exist

at all, will remain much the same sort of body which it is today though changing in its function as, limited by its nature and composition, it reacts to outside social and economic developments.

The other four chapters are out of the central stream. One of the most instructive essays in the book is that by Mr. H. E. Dale on the Parliament in its relation to the Civil Service. It contains a further valuable account of the procedure on a Bill before its introduction. Mr. Ivor Thomas writes on the organisation of Parties. Here is a mass of statistical and other information, not itself affected by a tendency to insert snappy generalisations of a less instructive character. Professor E. C. S. Wade has a chapter on the Courts and the Constitution. Excellent in itself, the subject is not of a piece with the other essays. Many will rejoice to read of the idea that a central administrative tribunal should be set up: "I can see little advantage in such a tribunal except such as may be derived from tidiness and uniformity." Sir Cecil Carr, writing once again on Delegated Legislation manages to find something new to say. This is a considerable achievement as the poor animal has been thrashed to the point of death by one writer and another since Sir Cecil first belaboured it 30 years ago. It seems to thrive on thrashing.

If it is accepted that the scope of governmental activity is most unlikely to be restricted in the future and that the extent of control by Parliament (as that body now exists) is essentially limited, then there are at least two possible types of remedy. The first is the establishment of a different kind of representative assembly (drawn, for example, from economic groups instead of geographical areas); the second is to strengthen and perhaps institutionalise the other forms of popular and group influences (for example, by requiring the Government as a matter of statutory duty and not merely of departmental practice to consult with affected interests) while leaving Parliament substantially as it is. Mr. Young says that the sum of the matter discussed in these essays is the conciliation of authority and freedom. What is becoming increasingly apparent is that new forms to make this conciliation more attainable have to be evolved and that the Parliamentary method is likely to remain in the future, as it has been in the past, only one of the devices which can be used to this end.

This volume is undoubtedly a most valuable addition to the extensive literature on the function of Parliament.

J. A. G. GRIFFITH.

THE BRITISH CABINET SYSTEM. By ARTHUR BERRIEDALE KEITH. Second Edition by N. H. GIBBS, Fellow and Tutor of Merton College, Oxford, and University Lecturer in Modern History. [London: Stevens & Sons. 1952. x and 466 pp. 37s. 6d. net.]

IT was inevitable that a book on Cabinet Government published only two years after Jennings' great work should suffer by comparison and fail to obtain the attention that it might otherwise have achieved. Keith's book was packed, indeed overcrowded, with significant detail. It was at once well-arranged and carelessly written. Acute observations on recent constitutional history and contemporary politics jostled with ferocious condemnations of persons and policies exciting the author's ready disapproval. Its defects could not fail to exasperate; yet it was a mine of information, and it is therefore good to see the appearance of a second edition. The editor would clearly have preferred a different approach to the subject from Keith's; but apart from excising a long chapter on the Privy Council and the Departments of State he has made comparatively few changes in the original text. Occasionally he has permitted himself to amend Keith's views where recent literature has thrown new light on

a situation. But it remains essentially Keith's book, with the warts as conspicuous as ever.

Criticism must be limited to the work of bringing the text up to date. It must be said that there are some surprising errors and omissions. We still read of the Minister of Town and Country Planning (43) and the Railway and Canal Commission (148). Neither of the last two Leaders of the House of Commons held the office of Lord President of the Council (121). New Standing Orders of the House of Commons for supply business and Scottish Bills and Estimates have been in force for five years, but the old rules appear in the text (198, 264). There are obsolete references to the position of Eire (340, 351) and the present treaty-making procedure for Canada is incorrectly stated (351). On the question whether a peer can be Prime Minister, there is no reference to the remarkable attempt of Chamberlain to secure Lord Halifax as his successor in 1940 (Churchill, *The Second World War*, i, 523 *et seq.*). Although Mr. Harold Nicolson's authoritative biography of George V was published after the completion of this edition, H.R.H. The Duke of Windsor's *A King's Story* (which is not mentioned) throws light on the political attitudes of George V and himself. Sir Patrick Hastings' own account of the *Campbell Case* in his *Autobiography* should have been mentioned. Keith's interpretation of Baldwin's "confession" concerning his election pledges in 1935 has been strongly challenged by Mr. R. Bassett. Nothing is said of the controversies that have surrounded the doctrine of the mandate since 1945. And surely it would be hard to find a more misleading statement than that a large proportion of the electorate nowadays votes for personalities rather than for policies (176–7). That the personal factor is of small account is shown by the election results of 1950 and 1951. Preliminary social surveys of voting at elections indicate, moreover, that the choice of most voters is swayed by emotional attitudes towards the parties that may have little relevance to the content of their programmes.

S. A. de Smith.

Mr. Justice Sutherland. By Joel Francis Paschal. [New Jersey: at the Princeton University Press. London: at the Oxford University Press. 1951. xii and 267 pp. (with index). U.S. price $4.]

English readers with some knowledge of American politics and of the American constitutional system will find this biography well worth reading. It is competently written by a practising lawyer with a good academic background, and though the author does not conceal his sympathy with the essentially conservative outlook of his hero—as indeed he indicates by his subtitle "A Man Against the State"—he has enough understanding of the liberal position which Justice Sutherland spent his life opposing to be able to give interest and reality to the conflict.

In some ways the most interesting part of the book is the account of Sutherland's early life and education. He was born in England, a distinction which he shares only with Iredell among all those who have been justices of the Supreme Court. His father became a Mormon, and migrated to Utah when the future justice was a mere baby. He was brought up therefore in an atmosphere of frontier independence and individual initiative. The bent which he thus acquired was accentuated by his teachers both at the Brigham Young University and at his Law School. In particular Dr. Maeser, the President of Brigham Young, developed the idea in him that "a divine hand had guided the framers" of the U.S. Constitution. To Maeser also "the fundamental principle of occidental education" was "the development of individuality." These two ideas were the mainspring of Sutherland's philosophy, and provided

the inspiration for all his more important judgments. He was always on the side of the individual, usually a business man or corporation, against the State, and usually on the side of the State against the Federal Government, except in respect of foreign policy. This outlook was reinforced by his teachers at the Law School of the University of Michigan, particularly by Cooley, a leading American disciple of Herbert Spencer, and of Chief Justice Campbell of the Michigan Supreme Court, a member of the faculty for many years. Mr. Paschal sets out to discover in the justice's judgments, and appears to do so to a remarkable degree, the influence which these teachers continued to hold over him in later years.

By the time, at the age of 60, he was appointed to the Supreme Court where he remained till he was 76, the Spencerian philosophy had become hardened into a pattern which formed the mould for that long series of judgments in which he helped others of like opinion to dam back the attempts of numerous State legislators to introduce welfare legislation. The frequency with which in American history the decision on these vital matters has been left to elderly men has often been alluded to by critics of the Supreme Court. The case might be regarded as proved by the career of Sutherland, but Holmes provides a still more striking example on the other side.

Almost from call to the Bar Sutherland was a successful lawyer and politician and at no period in his career, except for a short time when he was chairman of a commission on workmen's compensation, did he really come up against the reality of a workman's life in a modern industrial community. It is significant that this experience made him a convinced and successful protagonist of legislation to secure compensation for workmen injured in industrial accidents. He was also a convinced liberal in matters of procedural reform where again his personal experience had convinced him of the necessities. Oh, university teachers, when will you learn how dangerous it is to indoctrinate the minds of your students with theories which may pursue them through life, if the hard realities of events do not first break them to pieces?

C.

EQUALITY BY STATUTE. Legal Controls over Group Discrimination. By MORROE BERGER. [Columbia University Press. 288 pp. $3.25.]

THIS book is written primarily for American readers, and deals exclusively with an American problem of Political Science, the course and effect of legislation on discrimination against minorities of colour or religion. Yet this careful and thorough study has lessons for English students because the considerations which influenced action, legislative and judicial, in the United States apply equally to the questions of the black and coloured races in South Africa under English rule. The main thesis of the author is that legislation wisely applied can help to remove racial prejudice, and can affect not only the legal status but also the actual social and political condition of minorities.

Dr. Berger's study is thorough and clearly expressed, and for the most part free from the jargon which often makes American sociological treatises hard to understand. He remarks aptly in his introduction that Americans "seem to want laws expressing high ideals, but they seem also to want the convenience of ignoring or violating many of them with impunity. Our federal constitution and statutes require a general equality of treatment for all individuals, but our conduct as clearly denies this condition to many millions, citizens and non-citizens, in all regions." He sets out the strange story of how after the Civil War Congress passed amendments of the Constitution so as to assure equal civil rights and freedom from discrimination for the emancipated negroes, and how the State legislation of the South proceeded systematically to frustrate

those principles. It was still more remarkable that the Supreme Court of the United States upheld this reintroduction of discriminatory practice and whittled away the fundamental principles. As one of the Justices put it in a famous address: "We are under the Constitution, but the Constitution is what the judges say it is."

The judgments of the highest Federal tribunals for 70 years, from 1868 to 1937, had the effect of "buttressing the caste order." The white man was the superior, the negro was the inferior, and the court gave effect time after time to that caste system. Then after the New Deal of President Roosevelt, the court took a new direction, and for the last 15 years it has been engaged in "undermining the caste order." In the economic crisis of the thirties, the negro need of Federal relief was at least as great as the need of the white population. And during the World War the negroes, in the army and generally, advanced towards equal opportunity. The Supreme Court gave notable judgments upholding equality of rights for the negro minority, *e.g.*, the decision in *Sweatt* v. *Painter*, 339 U.S. 629 (1950) which held that a special law school for negroes opened by the University of Texas did not provide equal facilities, since it was inferior in regard to faculty, the variety of courses offered, and "in those qualities which are incapable of objective measurement but which make for greatness in a law school." The negro plaintiff in the case was entitled to be admitted to the University of Texas law school in accordance with the 14th Amendment of the Constitution.

Dr. Berger devotes a chapter to the New York State Law against Discrimination, which was enacted in 1945; and he explains the working of the State Commission against discrimination which was set up under it. He gives interesting statistical tables showing how the complaints under the law have been disposed of. The book ends with a chapter of general reflections on law and the control of prejudice and discrimination. It examines the doctrines of social psychology and psycho-analysis which are so popular in the United States. The conclusion is that law in our society is a formidable means for the establishment of conditions which discourage prejudicial attitudes. "It can codify our society's loftiest ideals rather than its basest practices."

Norman Bentwich.

Justice in Russia. By Harold J. Berman. [Harvard University Press. London: Geoffrey Cumberlege. 1951. xi and 322 pp. 31s. 6d.]

The most difficult type of book to write on a technical subject is a general introduction which seeks to be more than a dull summary of established principles or a factual description of administrative machinery. To attempt to write such a book on the Soviet system of law is a further couple of turns to the screw. It is a great tribute to the author of the book under review that it is intelligible to one who knows as little about Soviet law as I do and would, I think, be easily understood by one who knows no law at all. As the book is directed to the layman as well as to the specialist, my ignorance is not unfair to the author.

There are two hurdles which the writer of a book of this kind has to clear. His explanation and commentary must be clear and instructive; and he must persuade the reader that his sources of information are not only authentic but comprehensive. Mr. Berman jumps well over the first. The three parts of the book are entitled Socialist Law, Russian Law and Parental Law. These are the three strands of his thesis. He explains Soviet justice by reference to socialism, to history and to its parental purposes. In the third part, the chapters on psychiatry, the family and labour relations are packed with interest and information. The whole is well written and well presented and the author

is to be congratulated on the considerable measure of success he has achieved. Yet doubts remain. Is it possible at this time to write an objective book on Soviet law? "Objective" is admittedly a blessed word which asks more questions than it answers and in the long run, no doubt, we are all subjects. The yoke we are thrown under and the blinkers which are fixed to our eyes make progress into unfamiliar paths both onerous and stumbling. The author describes certain practical implications of Vyshinsky's arguments in his writings on legal matters. These implications, he says "are to be read where Soviet eyes are trained to read—between the lines." There seems to be a fusion of fact and comment here and one is not sure how the author knows what implications the trained Soviet eye would read. Another sentence reads: "We must presume (since we do not have the official report of the case) that not only did the court find the accused imputable but it also adopted as a rule of Soviet law the psychiatric principle stated by the Serbski Institute" of Forensic Psychiatry which reported on the case. It seems rather a lot to presume. Again: "Underlying the Soviet definitions and methods is the desire to maintain the mentally ill in the effective performance of their social roles and to keep them going, if possible, as normal persons. The purpose is not to promote the welfare of the individual, for his own sake, but to maintain his social productivity, in this sense to educate him, for society's sake." This sort of argument seems equally applicable to State action in any country—and no more profitable on that account. Again: "The law enters into family relationships at what has hitherto been a pre-legal level, playing the role of parent and educator, giving guidance to Soviet citizens on the moral and legal responsibilities of marriage, seeking to define those responsibilities in terms of the past and future of the family, its capacity for fruitful growth. Here, too, it must not be supposed that the underlying policy is a sentimental or romantic regard for the family for its own sake. The new developments have come as responses to pressing problems," *e.g.*, juvenile delinquency, the number of abortions, the divorce rate and the desire to increase population. It is not clear whether the author regards the attempt to solve these problems by legal methods as indicative of State interference or whether he would prefer a sentimental or romantic regard for the family or whether he is merely trying to suggest hidden motives for apparently beneficial policies. Lastly, the chapter on Law and Labour opens with these sentences: "There is an inevitable conflict between the specific economic functions of management and of labour, which no amount of socialism can overcome. It is a function of management *as management* to seek efficiency in the form of greater productivity and lower operating costs. It is a function of labour *as labour* to seek adequate compensation, conditions of health and safety, and workers' welfare in general." How far this conflict has come to be recognised as inevitable in the Soviet Union, I do not know. It is not, I think, universally regarded as a self-evident and platitudinous truism and a reader who carefully preserves the shadow of a hope that the conflict can be resolved with benefit to all parties will not read the rest of the chapter in a frame of mind which is wholly co-operative (if that is the appropriate word).

The first sentences of the author's Introduction are: "We would like not to have to think so much about Soviet Russia. If it were not for Soviet Russia perhaps we would not have to think so much at all. We might settle back more or less complacently and cultivate our own garden." In his Preface he writes that to believe that the Soviet system is run solely by terror and that the Soviet legal system is worthless window-dressing are "dangerous delusions, which in the long run only weaken us." Despite the many admirable passages in this book and the amount of information and instruction it gives, there is a taste of strengthening medicine about this dose of Soviet justice which might have been better omitted.

J. A. G. GRIFFITH.

Soviet Civil Law. A Comparative Study and Translation. By Vladimir Gsovsky. 2 Vols. [University of Michigan Law School. Ann Arbor. 1948 and 1949. xxxvii and 909 pp.; xx and 907 pp. $15.]

These two handsomely produced volumes, to which Professor Yntema contributes a Foreword, collate a great deal of research and drive a wedge of solid information into the mists of ignorance and distortion that surround the U.S.S.R. The backbone of the work is in Volume 2, which reproduces in an English vastly more readable than most sponsored by Soviet sources, the text of the major Soviet enactments on the Civil Law, with an index of statutes and cases cited, and a 30-page bibliography of publications on pre-Soviet and current law. This is a veritable mine of information for which a heartfelt tribute is due to American scholarship. Volume 1, which is the comparative survey, examines and expounds the law in its historic setting, and draws conclusions.

The first part of this volume consists of a general survey, while the second deals with special topics. The first two chapters, tracing the history of the Soviet Revolution and the evolution of the constitution are (like the historical setting to various special topics) scholarly and illuminating; the same can hardly be said of Chapter 3 (Present Order: Economic). In a book of 900 pages on civil law, an attempt to outline a prototype in State economic organisation in 18 pages seems misconceived; indeed the handling of economic questions is perhaps the least satisfactory part of the work. The particular contracts selected for discussion seem inappropriate in a Soviet setting, especially the emphasis on sale, while the consideration of landlord and tenant law is strangely urban in tone. Would not, for example, the law of agency have provided more interesting material? In defining at p. 392 the economic background of true (sic) corporate status as a sufficient freedom of disposal over property, the author is on disputable ground, and even more so in concluding at p. 655 that the Soviet return to a law of succession is evidence of its indispensability in an organised society. This may be linked with his general conclusion (at p. 149) that recent changes do not signify a retreat from major objectives of the Soviet régime, but rather the abandonment of methods proved to be inexpedient. Surely it is equally arguable that the return to succession to property, coupled with the establishment of the Suvorov military training schools (mentioned at p. 147) are evidence of the hardening into a caste system of the new class structure; that this, in short, is the point at which the elect among the farm animals resolved to walk upright.

The discussion of the collective farms and the rights of the household in the garden plots raises vast and interesting questions. In discussing, at pp. 731 and 787, the extent of war-time violations of regulations, the author may not attach sufficient weight to conditions of scarcity, in which it may be that the collective farm system receives its strongest justification, but his conclusion at p. 724 that the combination of collective farming and sale of produce from the household plot may soon be proscribed seems borne out by the increased taxation subsequently imposed on the produce of garden plots.

Much of Soviet labour law remains incomprehensible. Why the machinery of collective bargaining should be retained when trade union functions are practically limited to welfare and matters of administrative detail may be a matter for the psychologists. The author's comment (p. 805) that labour law is to a large extent criminal, may appear startling, but does not greatly further understanding of the impact on traditional divisions of the law when the State is the only possible plaintiff in many types of civil proceedings.

In the discussion of the social order, with particular reference to matrimonial law, the historical background is again accurate and vivid, as in the stress laid on the recognition of divorce in pre-Soviet law. But many questions are left unanswered. For example, at pp. 113, 177 and elsewhere, are cursory

references to the extension to the other Republics of the Code of Marriage and Family Law of the R.S.F.S.R. There is no examination of the problems involved in applying to Moslem States secular provisions for monogamy and a high marriage age (16 for women in, *e.g.*, the Uzbek and Tadjik Republics, and 18 in, *e.g.*, Kazakhstan). That the normal criminal sanction of two to three years for marriage with persons under age is increased in Turkmenistan to five years is mentioned without comment. There is in fact considerable evidence that polygamy and child marriage have by no means been eliminated in the Central Asian Republics, and that Government opposition by withholding promotion in the Party, and other forms of official disapprobation, is less effective than official sources admit. The radical decrees of 1936 and 1944 on State aid to mothers are not reproduced in Volume 2 and receive very cursory treatment in Volume I at pp. 131–32, which moreover gives the erroneous impression that such aid is confined to mothers of illegitimate children. Nor is the heavy present cost of divorce, though mentioned at p. 125, related to wage rates in such a way as to bring out its full significance. On the abolition of legalised abortion, with its implications of change in Government attitude, the author has no comment. And in the wider field of social climate the passages on patriotism at pp. 136–41 and 204–5 are surely incomplete without any mention of the post-war drive against cultural cosmopolitanism, with its anti-Semitic undertones.

The law of tort contains many points of interest, particularly the useful, if rather vague, doctrine of liability for increased hazard (section 404 of the Civil Code, discussed at pp. 504–7, 509–10) which the author rightly calls an interesting and sound attempt to apply the advanced doctrines of European jurisprudence. It is also revealing (pp. 525 *et seq.*) that the judges do not in fact take account of the property status of the parties in assessing damages for tortious liability, as provided by sections 405 and 411 of the Code, and that such damages are awarded only for proprietary loss (p. 539).

Perhaps it is from the chapters on the Soviet concept of law in general, private rights, and legal entities, that lawyers will be particularly tempted to expect too much. It is indeed doubtful if sufficient material on the theory and practice of the law is yet available for any exhaustive consideration of Soviet jurisprudence. But on legal theory there are telling quotations from Bukharin on the ascendancy of expediency over the rule of law, and from Vyshinsky at pp. 162, 176, 180 and 187, as supported by the Minister of Justice's instructions to the judges in 1947, quoted in the chapter on the Judiciary at p. 255. And there is an illuminating legal definition of the Communist Party in section 126 of the 1936 Constitution, quoted at p. 391.

The passage on sources of Soviet law from p. 215 seems rather confused, while the question of statutory interpretation perhaps receives inadequate discussion at pp. 217–22. But it is in the realm of the criminal law that the greatest shocks to Western susceptibilities are to be found, such as in the provision for secret statutes (p. 226), the punishment of innocent dependants of a fugitive member of the armed forces, under section 58 of the R.S.F.S.R. Criminal Code (p. 499), and, on the procedural side, the existence of special courts and the trial of civilian offences of subversion by military tribunals in peacetime. In purely civil matters, a rather more detailed examination of when actions are heard behind closed doors, that is, of how far section 95 of the Code of Procedure of the R.S.F.S.R. is applied in derogation of section 94, and what arrangements exist for publicising decisions, would have been welcome. For example, do the special arbitral tribunals for disputes between Government departments sit in public? Since reports on the working of Ministries are not published because of the danger of revealing State secrets (*e.g.*, industrial production figures), the answer is probably no, but an examination of the extent to which the secretiveness of a Government which monopolises all economic activity operates in practice might be rewarding.

For every criticism which may be made of these volumes, however, thanks are due to the author and the University of Michigan, who have here made

available for study the basic facts of the Soviet Civil Law without which, and the similar work of other scholars, chiefly in America, no consideration of a vast and important field of law would be possible.

O. M. Stone.

THE LAW OF AGENCY. By RAPHAEL POWELL, M.A., B.C.L.(Oxon.) of the Middle Temple, Barrister-at-Law. [London : Sir Isaac Pitman & Sons, Ltd. xliv and 339 pp. (with index) 14 pp. 40s. net.]

THE law of agency has attracted few writers in the past and for many years *Bowstead's Digest* has been the only monograph on the subject. This year, however, has seen the publication of Professor Hanbury's short book on *The Principles of Agency*, and the present more comprehensive work. One reason, no doubt, for the comparative neglect of this subject by textbook writers is that mentioned by Mr. Powell in his preface, the almost universal extent to which agency is brought in contact with other branches of the law. For example, one of the most difficult and important questions in the law of agency is the extent of the agent's authority and this cannot be completely answered without considering the authority of every kind of agent, from auctioneers to wives. Mr. Powell, of course, has not attempted to do this as it would take several volumes but it is inevitable that the authority of some agents, such as factors, must be treated in some detail and cannot be left to be gathered from the statement of general principles. A writer is therefore compelled to make a selection of the kinds of agent whose authority he will explain and the extent to which he will give a detailed explanation of it.

This book is described by the publishers as of great value to law students and a useful reference work for practitioners, from which it appears that it is written primarily for students. We may say at once that students who require a clear exposition of the principles of agency, as opposed to a mere statement of conclusions, will find all they need in this book. Mr. Powell tackles all the difficulties of his subject and draws freely upon the relevant legal literature as well as the authorities before he reaches his conclusions. The practitioner will also find the book very useful when it is necessary for him to examine a case from the point of view of principle rather than authority. Mr. Powell, of course, quotes numerous authorities, but the practitioner in search of a case to serve his purpose will probably find what he wants more quickly in *Bowstead's Agency* or *Halsbury's Laws of England*.

Sometimes in his discussion of principles Mr. Powell allows himself to be drawn away from his subject, not always with very happy results. For example, he devotes two pages (127, 128) to a consideration of the question "Why can the undisclosed principal sue and be sued by the third party?" After considering, shortly, the history of this right of action he comes to the conclusion, which is now the generally accepted one, that the reason was to satisfy commercial needs. He then proceeds to quote the passage in Denning L.J.'s judgment in *Smith and Snipes Hall Farm* v. *R. Douglas Catchment Board* [1949] 2 K.B. 500, 514, in which the principle is enunciated that a promise intended to be binding will be enforced by the courts at the suit of a person who was not a party to the contract, provided it was made for his benefit, which, the Lord Justice says is "implicit if not expressed" in Lord Mansfield's decision that an undisclosed principal can sue on a contract made by his agent for his benefit.

It is, at its highest, very doubtful whether an undisclosed principal's right to sue on a contract was ever based on the wider principle that a person could sue on a contract made for his benefit, but in any event if it was thought necessary to quote this passage from Denning L.J.'s judgment it should have been accompanied by a warning that the other two members of the court based

their judgments on quite different grounds and that the views expressed in the passage are contrary to authority as it is today, whatever it may be in the future.

Again, in pp. 160, 161, after a discussion of the general principles on which a principal is liable for torts and crimes committed by his agent, a comparison is made between a master's liability for his servant's torts and the liability of a principal for the torts of his agent. This leads to the statement " when the industrial legislation of the late nineteenth and twentieth centuries ensured the liability of a master for injuries to his own servants, the Courts were not slow to expand even the existing framework of the Acts of Parliament [footnote—*e.g.*, the Workmen's Compensation Acts] in order to ensure that the master should be liable for accidents to servants arising out of and in the course of the employment." This passage, which is irrelevant to the point under discussion, might well give the student the false impression that it was the courts and not the Workmen's Compensation Acts which ensured that a master was liable to his servant for injury by accident arising out of and in the course of his employment.

In recent years the payment of estate agents' commission has been the subject of numerous reported decisions on questions of construction. It may be doubted whether reports on such questions are of much value to the legal profession but the stream still continues and at least two more have been decided since the publication of this book. Mr. Powell deals fully with the cases and his analysis of the decisions will be helpful not only to students but to practitioners who have to advise on this branch of the law.

It could be wished that more space had been devoted to the topic of when and how long commission is payable after the termination of the agency. The general principle is that commission is not payable after the termination of the agency, in the absence of a reasonably clear intention to the contrary. For this proposition Mr. Powell cites *Nayler* v. *Yearsley* (1860) 2 F. & F. 41, to which he might have added a more modern case such as *Marshall* v. *Glanvill* [1917] 2 K.B. 87. The cases dealing with this question are all decisions on the construction of the contract, as are those dealing with estate agents' commission, but it seems anomalous to devote 16 pages to the latter and only two to the former particularly as the question of the right to continuing commission is, if anything, of more practical importance. The reader is entitled to expect some help as to the effect of a contract to pay commission on " repeat orders," but beyond the unexceptionable statement that this does not necessarily give a right to continuing commission no further information is given.

It is to be regretted that in the account of the important case of *Sellers* v. *London Counties Newspapers* [1951] 1 K.B. 784, more attention is given to the dissenting judgment of Sir R. Evershed M.R. than to the majority judgments of Singleton and Birkett L.JJ. A commission agent is frequently a servant and it had not been previously decided that such an agent, who is paid his commission only when his employer is paid by his customer, is entitled to commission on the orders he has obtained which are accepted by his employer even though his employer receives payment only after the termination of the employment. This is a welcome decision and applies to commission agents whether servants or not. Mr. Powell, it is true, discusses the dissenting judgment only to express his disagreement with it, but a lack of proportion is shown in citing the case only to deal with a point raised in a dissenting judgment, and not with the merits of the decision itself.

As has been pointed out earlier, omissions are inevitable in a book on agency. At the same time the omission of any reference to *del credere* agents occasions some surprise.

This is a book which has been carefully written and the author is to be congratulated in having produced the fullest systematic account of the English law of agency. The proof reading has been very well done and the text is singularly free from printers' errors.

The publishers have committed the fault, reprehensible in any book but unpardonable in the case of a law book, of omitting to put the date on the title page.

J. Charlesworth.

Pollock's Law of Torts. Fifteenth Edition. By P. A. Landon, M.A., M.C., Honorary Bencher of the Inner Temple; Fellow and Tutor, Trinity College, Oxford; Reader in Criminal Law, Oxford University; formerly Lecturer to the Law Society. [London: Stevens & Sons, Ltd. 1951. xlii and 446 pp. and (index) 84 pp. £3 3s. net.]

Once again we are indebted to Mr. Landon for having undertaken the unenviable task of bringing out a new edition of this famous treatise on civil wrongs, a task which he has carried through with his usual scholarship and thoroughness. This thoroughness is indicated by the fact that some 200 post-1939 cases have been added to this edition. Yet, of this 200, only a mere half-dozen or so have found a place in the text, the others being relegated to footnotes. This result follows from the policy adopted in the fourteenth edition, and maintained in the present one, which is "to preserve Pollock's language verbatim, so far as it is not actually misleading to the student." Consequently, most of the developments which have taken place in this dynamic branch of the law since the thirteenth edition in 1929 are discussed only in footnotes.

However desirable this policy may be in some respects, its shortcomings become obvious when we realise that, among those recent decisions so relegated to footnotes, are such important leading cases as *Christie* v. *Leachinsky* (false imprisonment), *Winter Garden Theatre* v. *Millennium Productions* (licences), *Bourhill* v. *Young* (negligence), *Searle* v. *Wallbank* (animals straying on to the highway), *The Cristina* (immunity of a foreign sovereign State), *Fisher* v. *Ruislip-Northwood U. D. C.* (duty of care on local authorities), and *Cutler* v. *Wandsworth Stadium* (right of action of individual for breach of statutory duty), to mention but a few; whereas, of the cases which are discussed at length in the text, many would no longer be cited as current authorities.

No doubt it is a great tribute to the remarkable genius of Sir Frederick Pollock that the text admits of the inclusion of these recent cases in footnotes without itself requiring considerable amendment. But the fact remains that the product of this policy is not so much a textbook on the current law of torts as a commentary on Pollock; and students and practitioners alike do not take kindly to an enforced investigation of the respective merits of the original 1929 text and of the criticisms thereof by the present learned editor in the footnotes, which often merely list a series of modern case references in support of his contention, *e.g.*, "In the light of this decision, one may doubt whether Pollock's main proposition is still correct" (p. 118, note 73). "This, with all respect to Pollock, is the better view" (p. 227, note 86). "It is submitted that Pollock's view is not consistent with the authorities" (p. 396, note 17). Above all, one may wonder what are the reactions of a student who had read through Pollock's first two chapters on "The Nature of Tort in General" and "Principles of Liability" ("a typically lucid and powerful analysis of legal doctrines," as Mr. Landon describes them at the beginning of his Excursus A), and who then proceeds to read the remainder of that Excursus (especially pp. 43–45), which is a ruthless condemnation of the most fundamental of those doctrines and of Pollock's stubborn bias in maintaining them!

The solution is not far to seek. Mr. Landon should be given *carte blanche* to mould and carve as an original artist, and the thirteenth edition could then be preserved intact as a *monumentum aere perennius* to the memory of one of

the greatest pioneers of the academic textbook. It is, indeed, difficult for the younger student, surrounded as he is by textbooks of all sizes and on all topics, all analysing cases and deducing principles—with varying degrees of success—to appreciate that even 50 years ago he would have been often obliged to have recourse in his studies to practitioners' books with their essentially different approach. This indicates the measure of our debt of gratitude and respect to "F. P.", and it would be a more fitting tribute to preserve the thirteenth edition as an authoritative exposition of the law of torts as it had developed, and was still developing, in 1929, with the addition of such notes as he may afterwards have made. The pioneer is none the less a man of valour because he occasionally takes a few steps in the wrong direction, and it is felt that criticism cannot legitimately be directed at a 1929 text even if subsequent decisions have developed certain branches of tort on different lines from the beliefs and anticipations of the learned author.

Confining our attention then, as we must, to the features of this new edition, we find from the Table of Cases that there are some 220 additional cases referred to (including the 200 recent ones already mentioned); some 70 cases which were in earlier editions have now been omitted, while new insertions in the text itself number only some 14, most of these being a matter of routine, such as the noting of a new statute. Two new Excursuses are in this edition, Excursuses E and F, on Contributory Negligence and *Read* v. *Lyons* respectively, but neither is included in the Table of Contents, and indeed neither approaches in value Mr. Landon's original four Excursuses in the last edition, these new ones being little more than highly condensed notes by way of introduction to Pollock's text. Addenda have been added to Excursus C on Conspiracy in the light of the *Crofters' Case,* and to Excursus D on Negligence; each of these will provoke considerable lengthy discussion.

By way of details, it is distressing to find Excursus C still referred to in the Table of Contents as Excursus D, in spite of the error having been noted in the last edition by no less a reviewer than Professor Winfield, while a "dark sentence" previously noted by another learned reviewer remains equally dark on p. 304, line 4. The Table of Cases and the Table of Statutes both have their full share of wrong page references; the reference in the Table of Statutes to the Patents and Designs Act, 1949, should be to the Patents Act, 1949, as there is now a separate Registered Designs Act; and there are also several omissions from the Table of Cases, *e.g., Glasgow Corporation* v. *Muir* (p. 329), *Hart* v. *Griffiths-Jones* (p. 40), *Nance* v. *British Columbia Ry.* (p. 353), and strangely enough, even allowing for the lateness of the decision, *National Coal Board* v. *Evans* (pp. 128 and 134); incidentally the reference to this case in note 56 on p. 134 should be to p. 128, not p. 158.

Footnote 14 on p. 50 cries out for a reference to the doubts of Goddard L.J. (as he then was) in *Bramwell* v. *Bramwell* [1942] 1 K.B. 370, as to whether an action can be brought by a husband against his wife for the recovery of land, since, if she is wrongly in occupation of it, she is a trespasser and the action is in tort, and so not maintainable by reason of section 12 of the Married Women's Property Act, 1882. Other notable omissions appear to be *Canadian Pacific Ry.* v. *Lockhart* [1942] A.C. 591 (P.C.) (on the scope of employment); *McQuaker* v. *Goddard* [1940] 1 K.B. 687 (on the distinction between animals *ferae naturae* and *mansuetae naturae*); *Travers* v. *Gloucester Corporation* [1947] K.B. 71 and *Old Gate Estates* v. *Toplis* [1939] 3 All E.R. 209 (both limitations on the application of the principle of *Donoghue* v. *Stevenson,* and strange omissions by such an antagonist of that principle!); and, perhaps, the most striking of all, *Wilsons & Clyde* v. *English* [1938] A.C. 57, with its enunciation of the personal duties of an employer which has founded a whole line of case-law. In the last edition this case was referred to in connection with the doctrine of Common Employment. Pollock's discussion of this doctrine has now been omitted in view of its abolition by the Law Reform (Personal Injuries) Act, 1948, but this case remains of considerable importance.

Incidentally the Index contains the alarming entry: Employment, abolition of!

Such details are, of course, matters of small moment, and can easily be rectified. What is of greater concern, as already indicated, is the question of general editorial policy. One may justly ask for whom the book is intended. Sufficient has been said to indicate the objections of a practitioner and of the normal student, and law teachers must surely hesitate before recommending it as a standard textbook to any but their most advanced pupils. Moreover, in spite of the system of square brackets, judges—and lesser mortals—still go to the thirteenth edition to find the *ipsissima verba* of the learned author, however much one may sympathise with Mr. Landon's feelings on this score. All in all, therefore, no better submission can be made than in Mr. Landon's own words in a recent review by him, "Yet our humble view is that, in spite of all the brilliance and erudition that Mr. —— has shown to us in this new edition, it would have been better if he had written a new textbook under his own name."

C. F. Parker.

Jarman on Wills. Eighth Edition. By Raymond Jennings, K.C., assisted by John C. Harper. 3 Vols. [London: Sweet & Maxwell, Ltd. 1951. ccclxiv and 2197 pp. £13 13s.]

Jarman was first published in 1841–43 in two volumes. The seventh edition was published in 1930 and was in three volumes. These bare facts are some indication of the prodigious task which the editor of the eighth edition had to face.

Mr. Jennings explains in the Preface that he felt "called upon to distinguish between sections which, by the passage of time, ought to be regarded as authoritative, and those which the passage of time has made inaccurate or misleading." The former he has "left severely alone," while the subjects falling within the latter class "have been largely rewritten." These latter include "abatement and valuation of annuities" (pp. 1945–52), "secret trusts" (pp. 907–13), "implication of gifts to survivors" (pp. 647–54) and "the meaning of money" (pp. 1009–14, 1284). To reduce the length of the work notwithstanding the incorporation of a great volume of new material, certain matters have been omitted such as the section dealing with insolvent estates and the Rule in *Shelley's Case* and analogous rules. One completely new chapter has been added. It relates to the Inheritance (Family Provision) Act, 1938, and is written by Mr. Michael Albery. In general, the law is as stated on July 1, 1950.

The first question that naturally occurs to the reviewer of such a substantial work is whether the editor has pruned heavily enough, and the answer that suggests itself is that he has not. There is still a good deal of matter left which in Mr. Jarman's own words "every passing day tends to render less practically useful." Examples are the sections on Legacy and Succession Duties and Restraints on Anticipation. But the most obvious dead wood takes the form of long passages containing full statements of facts and discussions of old cases. The revision where made seems to have been done with care and discrimination. But here again quite a number of matters, mostly of no great practical importance, have escaped the editor's attention. Two such examples may be cited from Chapter III, which deals with "Personal Disabilities of Testators," namely (a) the effects of the British Nationality Act, 1948 (which changed the title of the British Nationality and Status of Aliens Act, 1914, and amended section 17 of that Act by the omission of the word "natural-born") have been overlooked on pp. 55–56, and (b) so has the repeal of sections 6–30 of the Forfeiture Act, 1870, by the Criminal Justice Act, 1948 (see pp. 57–58).

The rewritten and additional sections seem to be most competently done.

This is particularly characteristic of the chapter on Family Provision (Chap. V, pp. 73–107), of the chapter on Gifts for Illegal, Superstitious and Charitable Purposes (pp. 223–283); of the section mostly on the meaning of money (Chap. XXX, s. 111, pp. 1009–15); and of the section dealing with the payment of legacies and shares of residue.

The Editor and Publishers deserve the warmest congratulations on the undoubted success which has attended the preparation and production, in extraordinarily difficult times, of a new edition of a work of the authority and size of *Jarman*.

D. HUGHES PARRY.

KERLY'S LAW OF TRADE MARKS AND TRADE NAMES. Seventh Edition. By R. G. LLOYD, M.A.(Cantab.), B.SC.(Lond.), Barrister-at-Law, and the late F. E. BRAY, K.C. [London: Sweet & Maxwell, Ltd. 1951. lxxviii and 1053 pp. Price £7 7s.]

THE previous edition of this leading textbook appeared as long ago as 1927. In the meantime the Act of 1938 had introduced fundamental changes into this branch of the law and a number of important decisions (notably those in the *Aristoc* and *Bismag Cases*) had interpreted them. The revision of the book was begun by Mr. Bray in 1938, discontinued during the war and recommenced with the assistance of Mr. Lloyd in 1946. It was substantially completed by the time of Mr. Bray's lamented death in 1950.

Mr. Lloyd, in his Preface, tells us that Mr. Bray took the view that the new edition should retain most of the material contained in the last and he and Mr. Lloyd therefore set themselves the formidable task of fitting the new law into it with only such changes of the old arrangement as were needed to avoid repetition. The result, with all respect to the judgment of Mr. Bray (an honoured and beloved member of the Bar), is not altogether happy. As Mr. Lloyd also reminds us, the 1938 Act is "a complicated piece of legislation abounding in cross references, provisos and exceptions and containing some sections drafted in language which the courts have described as 'turgid and diffuse'." Notwithstanding the editors' pruning these features also characterise this book. Indeed, the reviewer, who has long suspected that over much practice with "made-up words" has an adverse effect on literary style, finds his suspicions confirmed. It must be confessed that this book is exceptionally difficult to read or to find one's way about in.

Nevertheless a well-deserved tribute must be paid to the scrupulous care and thoroughness with which the revision has been undertaken. While one regrets that the learned editors were compelled to pour new wine into old bottles, at least they have not spilled a drop. The strictures on perfunctory editing which are so often rightly levelled at old-established practitioners' books cannot be applied to this. Moreover, Mr. Lloyd has done his best to ease the burden on those using the book by an exceptionally full equipment of Tables, Appendices and Indices. For example, there is a table showing the sections of the new Act, the corresponding sections of the old, and the pages on which they are treated in the text. The Table of Cases lists them both by plaintiffs and defendants although it seems a false economy only to include page references and reports under the former, and never, in the Table, to include the date unless this forms an integral part of the reference (dates, however, are invariably given in the text and footnotes). The changes introduced by the 1938 Act are set out in Chapter 1 and a new chapter has been added on Deceptive Resemblance in which the material on that topic has been collected.

A book reviewer gets tired of animadverting on the price and in this case he has no breath left with which to do so. But, however expensive, the work

is indispensable to those practitioners who work in this field and they will grin and bear it even if their grins become somewhat rueful as they bury themselves in its pages.

L. C. B. G.

ADVERTISING AND THE LAW. By F. P. BISHOP. Second Edition by P. N. S. FARRELL. [London: Ernest Benn, Ltd. 1952. ix and 221 pp. (with index). 18s. net.]

THE output of books intended to provide *vade mecums* for practitioners in particular fields of business or trade has, during the last 30 years or so, been significant. These always seem to me to present something of a danger to their users, because it is not possible in such a work to set out the apposite legal rules in more than the most summary form, and anyone attempting to apply the law which he has learned in such a book to some concrete transaction upon which he is engaged would run a graver risk of landing himself in trouble than if he were ignorant of the law altogether. If the object be, as with students' books, to familiarise a youth embarking upon a business career of a particular kind with the legal framework which is to govern his activities, well and good, but the authors of books of this kind, and the present one is no exception, seldom draw attention to the fact that nowhere is it more true than in the law that "a little learning is a dangerous thing."

Having said this I will admit at once that this book is decidedly better than most similar ones with which I am familiar. The author, who is a barrister, has had considerable experience of the practical side of advertising, and has therefore been able to marry his statement of legal rules to the facts which govern the business of advertising in an exceptional and very helpful way. Used cautiously, and with the ever-present knowledge that in any case where there is the slightest doubt as to the legal position professional advice should be obtained, it should be of considerable value to advertising agents.

The most important part of the book is undoubtedly that which deals with contract. This is divided into three chapters, on the advertiser and publisher, on the advertiser and the public, and on agency. The result of the first division is a little confusing since although the principles governing Chapters I and II are exactly the same the discussion of them is somewhat arbitrarily divided up: misrepresentation for example is altogether left out of Chapter I, but something is said about warranties in both chapters. The subject of mistake is not properly dealt with in either chapter, though there are several pages on "mistakes in advertisements." It is of course not possible to give even a cursory introduction to contract law in some 50 pages, especially when a substantial proportion of the space is devoted to the consideration of a number of decisions in which advertisers have been involved. The chapter on agency contains a useful discussion as to the position of the professional advertising agent, who is considered, with justice, not to be an agent at all in the majority of cases, but an independent contractor. There is here an excellent short statement on the difficult problem of commissions.

In the section on tort the subjects of copyright and trade marks are discussed, in addition to defamation, nuisance, trespass and negligence, the last-named in an altogether too cursory manner.

Finally, Part III, the shortest but one would have thought the most practically important in the book, deals with the regulation of advertisements. The chapter here on the control of outdoor advertising under the Town and Country Planning Act, 1947, and the regulations made thereunder, strikes me as being quite inadequate: it is only some four pages in length. The regulations might at least have been set out in an appendix.

C.

WIGRAM'S JUSTICES' NOTEBOOK. Fifteenth Edition. By EDWARD HOOTON. [London : Stevens & Sons, Ltd. 1951. xxxi and 428 pp. (with index). 37s. 6d. net.]

JUSTICE IN MAGISTRATES' COURTS. By FRANK J. POWELL. [London : Sir Isaac Pitman & Sons, Ltd. 1951. xi and 212 pp. (with index). 16s. net.]

WIGRAM is perhaps the most useful of all the *vade mecums* published for the assistance of magistrates. Unlike *Stone's Justices' Manual* it has not swelled to the point at which few justices other than those with professional qualifications, and not by any means all of these, can make head or tail of it. On the other hand, unlike some volumes which have appeared recently, it does, subject to qualifications, contain enough material to satisfy the needs of the magistrate who takes his work seriously.

Since this is the first occasion on which the work has been noticed in the *Review* it may be useful to describe shortly the scheme of the book. Part I which is comparatively short, taking under 50 pages of text, is concerned with the jurisdiction of magistrates' courts, and with the procedure to be followed in handling the various types of case, whether triable summarily, or on indictment. This part also contains a chapter on Quarter Sessions.

Part II which with some 350 pages of text takes up the greater part of the volume, consists of an alphabetical digest of the various matters which are of concern to magistrates, as abduction, abortion, abusive language. There are three useful appendices which are in effect lists of offences, indictable offences triable summarily, offences triable at Quarter Sessions, and additional offences triable at Quarter Sessions under the Administration of Justice (Miscellaneous Provisions) Act, 1938.

The statements of the law in *Wigram* are on the whole clear and accurate, and are, generally speaking, concerned with specific offences, rules, or jurisdictions; no effort being made to give general advice to magistrates in connection with the due fulfilment of their difficult duties. Here and there an exception to this policy occurs, as where in commenting on the judicial oath taken by every justice of the peace the author remarks that justices "will avoid making many mistakes . . . if they will bear in mind the last part of this oath," which is the part in which they promise "to do right to all manner of people after the laws and usages of the realm without fear, favour, affection, or ill will." Without going so far in the direction of general instruction as does Mr. Powell in his book described below I think that Wigram would be improved if it contained rather more advice of a general character.

Perhaps the most difficult jurisdictional problems for magistrates are those concerned with such matters as when to try and when not to try indictable offences, and (especially) the so-called "double-barrelled" type of case, *i.e.*, where an offence can be tried summarily with one punishment, or on indictment with another. Some of the changes introduced by the Criminal Justice Act, 1948, have added to the complication. A valuable attempt is made to deal with this problem schematically, and if the result is not altogether a picture of clarity that is largely due to the intractable nature of the material.

The alphabetical digest method of presentation has undoubtedly great advantages from the point of view of a lay magistrate, especially when it is supplemented, as here, by a fairly comprehensive index. The principal criticism which I have to make is that the author often has divided opinions as to whether he should deal with matters of a general character, such as punishment, in Part I or Part II. As it is his treatment of this topic in his digest is largely taken up with a note on probation, which is certainly excellently done, and cannot fail to be of great value to magistrates who will take the trouble to read it. Most of the material on juries however appears in Part I and but for the index the reader would certainly be in some difficulty. On the whole I

think these general topics would be better handled in separate chapters in Part I. The title "Evidence" in the digest, for example, contains a great deal of useful material, but it is not well arranged. I think that, without some further assistance, it would not be possible for an inexperienced reader either to get a good grasp of the general principle of evidence, or to pick out what in practice are the really important rules.

It is also exceedingly difficult if not impossible to frame a digest of a major crime which will be of real use to a lay magistrate, at any rate if it goes beyond the essential elements which constitute the crime in question. It seems exceedingly doubtful whether it is wise to go beyond this in the case of offences over which magistrates have no jurisdiction except in respect of committal, such as rape, or forgery. On the other hand offences which are peculiarly within the cognisance of magistrates such as those under the Road Traffic Acts need full treatment, and these are in fact admirably dealt with in *Wigram*. Reference need only be made to the section relating to "special reason" for not suspending a driving licence where the recent cases on this difficult subject are clearly dealt with.

The post-war period has been unusually fruitful in legislation affecting magistrates' courts, and the work of incorporating this in the present edition has been carefully and accurately carried through by Mr. Hooton, who is a magistrates' clerk of considerable experience.

Mr. Powell's book is of quite a different character from *Wigram* to which it furnishes a valuable companion volume. The author's object is to provide for magistrates the background instruction which is if anything more important than a knowledge of criminal law or procedure. Although the late Sir Leo Page did notable work in this direction there has been an unfortunate absence of competent books written for this purpose, and Mr. Powell, who is one of the senior Metropolitan magistrates, has undoubtedly gone a long way to fill this gap. The scope of this volume is best indicated by referring to his chapter headings, which run as follows: Justices of the Peace; Acting Judicially; Evidence; the Magistrate and the Police; the Citizen and Legal Assistance; the Adult Court; the Juvenile Court; the Matrimonial Court; the State, the Law and Religion. In the earlier chapters particularly, Mr. Powell places at the disposal of magistrates the fruits of his own long experience of administering criminal justice, and gives wise advice on many matters which only years of practice, and an acute appreciation of that practice could teach a magistrate who did not have the advantage of going to school with somebody like Mr. Powell. The later chapters contain much more legal material of the type provided in *Wigram* and similar volumes. It seems to me a pity that Mr. Powell should not have devoted his book entirely to the more general type of information, for there are quite a number of other topics which he might have dealt with, such as the legal profession, the relationship of the justices to their clerk, which is just touched on by means of a quotation from the report of the Roche Committee, and the question of punishment, all topics of great importance. To suggest one line of approach only, some indication of how to assess the work of the advocates appearing before them, and when to be on guard, would be distinctly useful to lay magistrates.[1]

A good deal of the material in the present volume was got together in connection with a course of lectures which Mr. Powell delivered to lay magistrates under the auspices of the Magistrates' Association which has, especially during the post-war period, been doing work of great value in the training of magistrates for their work. Sometimes the book rather obviously bears the impress of this fact, as for example in the large number of anecdotes which, useful as they may be to enliven lectures, somewhat detract from the quality of a serious volume such as this.

[1] *Cf. The Juryman's Handbook* by Alec Brown, in which an attempt is made to do this for jurymen.

In his final chapter, which bears the misleading title of "The State, the Law and Religion," Mr. Powell has some useful observations to offer on the state of the community in relation to crime during the post-war period. Here he makes interesting use of material from the annual reports of the Prison Commissioners, and the Commissioner of Metropolitan Police, and here are to be found paragraphs on some of the recent penological experiments in prisons and Borstals which might well have formed part of the general chapter on the problem of punishment which I should like to have seen. There are also in this chapter a number of paragraphs dealing with the Christian approach to the problem of crime, but I do not think that these add anything to the value of the book.

C.

NOTABLE BRITISH TRIALS SERIES. Vol. 74: The Trials of Patrick Carraher. Edited by GEORGE BLAKE. [London: William Hodge. 1951. xiv and 278 pp. 15s. net.]

NOTABLE BRITISH TRIALS SERIES. Vol. 75: The Trial of Neville George Heath. Edited by MACDONALD CRITCHLEY, M.D. [London: William Hodge. 1951. 239 pp. 15s. net.]

IT may be instructive to set out the record of the Glasgow hooligan, the son of a respectable working-class family, whose final trials are described in the first of these new volumes of the *Notable Trials* series.

Born in Glasgow, October, 1906.

1923—January: 14 days' imprisonment for theft and assault. February: £2 caution for six months or 14 days, for theft. March: sent to Borstal for three years for theft (four charges).

1926—June: three months' imprisonment for theft.

1927—July: four months' imprisonment for house-breaking with intent to steal. December: six months' hard labour for theft.

1929—August: six months' hard labour for theft.

1930—April: 12 months' hard labour for attempted house-breaking.

1931—June: 18 months' hard labour for theft by house-breaking.

1933—February: 18 months' hard labour for theft by house-breaking and breach of the peace.

1934—September: two years' hard labour for house-breaking with intent to steal, and possessing explosives.

1938—September: three years' penal servitude for culpable homicide (stabbing with a knife in assault).

1943—May: three years' penal servitude for assault and razor-slashing.

1946—March: sentenced to death for murder (stabbing).

Patrick Carraher was hanged at Barlinnie Prison, Glasgow, on April 6, 1946, and, says the editor of this volume, Mr. George Blake, "most of us would agree that Society was well rid of a social pest."

Others might not view these data with the same complacency; they may feel that, whether regarded in the light of reason or humanity, there must be something monstrously wrong here almost from the beginning to the end. Whatever the causes which led this young man to embark on his criminal career (and the appalling environment of Glasgow slums had no doubt its share in them), it is hard to avoid the conclusion that our penal system dabbled with this criminal, as with so many like him who early in their life show a propensity to crime, in the most incomprehensible and irresponsible manner.

In dealing with those who persistently commit crimes of violence, it is the plain duty of the law to protect Society against the danger of further depredations. It can only do so, it would seem, by a consistent and systematic effort

to recall them to their duty to others and by endeavouring to readjust them to life in the community, and by taking from the criminal all opportunity of committing further crimes until such treatment has had a real chance of success. Judged by this yardstick, Carraher's record is beneath comment. So obvious was his gradual progress to violence, so predictable the issue which eventually cost *three* human lives, that one wonders whether anybody ever asked himself what the prisoner would do upon each of his many releases from prison. That it was not going to be honest work for which he was never, in any case, properly fitted or trained, must have been plain.

It is unlikely that the kind of treatment this criminal received from the law, with its recurrent and quite pointless short sentences, would be repeated today. Even so, it is a record which deserves careful attention because it is in many respects typical and poses fairly the fundamental questions of penology. This, and the picture which emerges of the life and habits of a certain, not necessarily delinquent, section of the population of the big industrial towns, gives value to this account of Carraher's two trials.

The two terrible sadistic murders committed by Neville Heath within a fortnight of each other are still fairly fresh in public memory. The trial, reported in Volume 75 of the series, turned almost exclusively on the evidence given on the plea of insanity by the chief medical expert witness for the defence, a psychiatrist. Dr. Hubert did not do very well in the witness stand; he is described as hesitant and unconvincing. His position, like that of every medical man in such a trial, was in any case a difficult one, for it is in the interest of the prosecution to generalise and to place the expert in a situation where he is supposed to give categorical answers covering all criminals of a certain type, while the doctor is concerned only with the individual in question, the accused. Terms of technical import, moreover, such as "free from criminal responsibility" (which in actual effect means, of course, locking up at Broadmoor) tend to be employed as if they meant, and were intended to convey to the jury, "allowed to go scot free," while the wording of the M'Naghten rules forces the expert witness for the defence to go into mental convulsions to fit himself in rather than to speak in his proper medical terminology.

The report of the Royal Commission on Capital Punishment which is now awaited, may have something to say on these questions. Meanwhile, one closes this account wondering somewhat uneasily whether the result of the trial would have been different if the psychiatrist had proved what is called "a good witness," better at giving simplified answers instead of betraying the doubts which must beset many serious scientists in the present state of our knowledge of the human mind.

On one point in this full account the trial leaves at least one reader with a wish for a little more information; it concerns the night spent by the prisoner at the police station immediately after his arrest. Heath is said to have arrived there at 5.30 p.m. and to have been allowed to sleep a little at 5.30 next morning, having taken from 11.30 p.m. to 2.45 a.m. to write an account (close on 1,400 words) of his movements on the crucial days. At the trial "this matter," says the editor rather cursorily, "was not pursued."

The choice of photographic illustrations to this volume is peculiar. There are two which show nothing but a few bushes and some bracken which might be taken almost anywhere, but are described, no doubt justly, as "Branksome Dene Chine, Bournemouth," where the body of the victim was found. Another illustration can only have been added to prove that with ingenuity it was possible to discover something even less relevant; it bears the following caption: "A drawing made by Margery Gardner [the other victim] when aged about 15. She showed much early promise in her sketching, especially when depicting animals."

H. A. Hammelmann.

DAS ZIVILGESETZBUCH VON GRIECHENLAND (1940) MIT DEM EINFÜHRUNGSGESETZ. Translated and introduced by DEMETRIUS GOGOS, Attorney and Lecturer at the University of Munich. (Materialien zum ausländischen und internationalen Privatrecht. Edited by the Max-Planck-Institut für Ausländisches und Internationales Privatrecht, vol. 1). [Berlin: Walter de Gruyter. Tübingen: J. C. B. Mohr (Paul Siebeck). viii and 308 pp. Dm. 89.]

AMONG the minor consequences of the Hitler régime has been the discontinuation of the series of commented editions of civil codes with German translations, edited by Karl Heinsheimer. The Max-Planck-Institute now offers the first of a series of volumes which—in a much more modest way—seems to be intended to fill to some extent the gap which has been left. The present first volume—unlike the volumes of the Heinsheimer edition—has only a very brief introduction and no commentary. But there can be no doubt that it will prove a boon to comparative lawyers to possess a German translation of the most modern Continental Civil Code—a work which, better than any other contemporary publication, gives a summary of the results of Continental legal scholarship in the field of the civil law. Dr. Gogos' translation appropriately follows strictly the German legal terminology. It makes easy and pleasant reading. The absence of an alphabetical index will be regretted in particular by non-German readers. Whether the marginal notes are part of the official text of the Code or whether they are appended by the translator remains a puzzle to those who have no access to the original.

English readers require no introduction to the Greek Civil Code, having regard to Professor Zepos' informative lectures on Greek law. The present reviewer may, however, be permitted to say that neither Professor Zepos nor Dr. Gogos state as clearly as it should be stated that the Greek Code is in essence nothing but the German Civil Code brought up to date and adapted to the social and national conditions of Greece. If it is said that the Roman law background which is common to Greek and German law was responsible for the close similarity of both Codes, the present reviewer must respectfully be allowed to differ. The Greek Code has literally taken over from the German Civil Code some of its most prominent non-Roman features, such as the famous § 242 (which is § 288 in the Greek Code), its peculiar doctrine of breach of contract, its principle of acquisition of ownership by good faith and many other ideas and conceptions which have no Roman origin. Dr. Gogos protests against the view that this Code constitutes a reception of German law in Greece. But there is no justification for this protest. The Grand Duchy of Baden introduced the French Civil Code with some 500 amendments, Turkey may have amended the Swiss Civil Code even more strongly—nevertheless we are entitled to speak in both cases of a reception. Even where the Greek Civil Code deviates from the German BGB, it is easy to see that German law and German legal scholarship have exercised a profound influence. Thus the law relating to commorientes differs from that of the German Civil Code: it has in fact incorporated into the text of the Code the principle introduced in Germany by the Law on Missing Persons of 1939. The provisions on the law relating to the right of personality mirror the dominant view among Swiss and German writers on this topic. The Greek Code, it is true, presents a much more polished appearance than the German code. Its language is much simpler, its wording clearer. There are no cross references. But these differences refer to form, not to substance.

These remarks are not intended in any way to detract from the merits of those responsible for the introduction of this Code. On the contrary: the German Civil Code of 1900 is a work of very high merits. If its form is rendered less repugnant, its obsolete parts struck out (as *e.g.*, in the law on

matrimonial régimes) and if it is brought up to date with the development of contemporary legal and economic thought, it can represent, in the present reviewer's view, a most excellent instrument in the service of justice. It is a nationalist prejudice to believe that every State has the duty of presenting to the world a new-fangled system of law. Both justice and the spirit of international co-operation are much better served if one of the existing codes is taken as the basis and alterations are restricted to the minimum required by national and social circumstances and by the moral and economic developments since the times when the earlier code came into force. This the Greek legislator seems to have felt. This Code is therefore a welcome contribution to the approximation among themselves of the Continental European Codes of Civil Law.

E. J. Cohn.

Geschichte des Verbrechens. Versuch einer Historischen Kriminologie. Von Gustav Radbruch und Heinrich Gwinner. [Stuttgart: K. F. Koehler. 1951. 305 pp.]

Rechtsphilosophie. Von Gustav Radbruch. Vierte Auflage besorgt von Dr. Erik Wolf. [Stuttgart: K. F. Koehler. 1950. 392 pp.]

Radbruch's *Grundzüge der Rechtsphilosophie*, first published in 1914 and fundamentally revised by the author for the last edition published in his life-time as long ago as 1932, became virtually unobtainable in Germany after its author had been silenced and his book proscribed by the Nazi régime. Its reissue became therefore an urgent necessity and Professor Erik Wolf, as editor of the fourth edition, has preserved the text unchanged, adding only a bibliography of Radbruch's writings on jurisprudence as a supplement and small number of relevant and characteristic essays and articles of the post-1945 period which might otherwise be lost to the student.

In a fairly extensive survey of Radbruch's life and work which introduces his edition, Professor Wolf mentions that at the time of his death in 1949, Radbruch was still engaged on a projected epilogue to his main work as well as on a historical study of crime and punishment in Germany. This latter work has fortunately been completed by Radbruch's pupil and collaborator, Heinrich Gwinner, and now makes its posthumous appearance under the somewhat sweeping title, *Geschichte des Verbrechens*. Conscious of the importance of legal studies as studies in social science, Radbruch was here concerned with tracing the history of crime as an integral part of social history, the more so since no such work (comparable, perhaps, he thought, to L. Owen Pike's *History of Crime in England*) exists in German. In the foreword to the book, he and his co-author express their intention of considering crime as "a phenomenon of social pathology, of crisis within the social, political and cultural life" and of examining its causes by the comparative method of historical criminology.

The authors thus intentionally move away from the history and development of criminal law and procedure as such to a broader examination of delinquency as an expression, both in kind and in degree, of *Zeitgeist* and social conditions at different periods in the past. Such a comprehensive study requires of course an immense amount of spade-work on material difficult to trace and hitherto largely untapped: registers of local courts, regional chronicles and histories, broadsides, pamphlets and prints of all kinds as well as contemporary eye-witness reports of crimes and punishment. As the authors were themselves aware, this *Geschichte des Verbrechens*, episodic and sometimes rather popular in treatment, still leans heavily on secondary sources. Nonetheless, if this book should succeed, as may be hoped, in attracting readers and students

to this strangely neglected field, they will find here many stimulating opinions and suggestions and will have cause to be grateful for another work whose very conception bears witness to the wide range and originality of Radbruch's mind.

H. A. HAMMELMANN.

UEBER DAS JURISTISCHE DENKEN. Societas Scientiarum Fennica. Commentationes Humanarum Litterarum. XVII 5. By OTTO BRUSIIN, Lecturer at the University of Helsinfors. [Kobenhavn: Ejnar Munksgaards Torlag. Helsinfors: Akademische Buchhandlung. Helsinfors: Nordische Antikvarische Buchhandlung. 1951. 164 pp.]

THE learned author modestly refers to the six chapters contained in this publication, which is sponsored by the Finnish Scientific Society, as "fragments." If these chapters are in fact fragments they are like those fragments of a master's hand which seem to the grateful reader more attractive by reason of the very fact that they are no more than fragments.

Dr. Brusiin's studies are studies in the general theory of law. But that does not mean that—like so many other attempts in that field—they deal with what to the legal practitioner will seem in most cases either trivial or irrelevant. On the contrary: from the very first page of this work the reader feels that what is at issue here is clearly of paramount importance for a true understanding of the working of law in our times. That this impression of vitality is maintained throughout this book is due to the fact that Dr. Brusiin has not confined himself to arguments which to most practitioners will seem at best purely conceptional in character or at worst derived from accidental twists of language. He has roamed far and wide in order to obtain material on which to draw for laying a safe fundament on which to build the structure of his theory: anthropology, sociology, legal history, legal philosophy, comparative law, theology and—last but not least—a shrewd observation of the practice of law in his own country have all been called in to assist. The result is a work which has held the present reviewer spellbound from beginning to end.

It is unfortunately to be feared that a mere summary of the results of Dr. Brusiin's investigations will give a misleading impression, because it is not possible to give, in a narrow space, an idea of the wealth of colourful elements of which the picture he presents is composed. The first chapter (Man and his Law) finds the origin of law in the organisation of human social life and considers the effect which the rationalisation of society has on law. The second chapter (The Legal Profession and the Types of Legal Practice) deals on a comparative basis with the origin and nature of the profession of the law and the different types of its activities. It is noteworthy and no doubt fully justified by recent developments that the author includes in the list of these types the drafting of legal rules and the formulation of directives within a civil service hierarchy in accordance with which officers of lower rank have to administer statutory rules. The third chapter (The Products of Legal Thinking) is devoted to an interesting structural analysis of the legal rule followed by some no less interesting remarks on legal language. The fourth chapter (Constant Characteristics of Legal Thinking) is, in the opinion of the present reviewer, the most important of the book. Dr. Brusiin finds the particular aspects by which the thinking of the practising lawyer is distinguished from that of the layman in its schematic simplification of reality, in its teleologic bent and in its trend towards a systematic harmonisation. He has not overlooked that these characteristics are not present in equal measure in every type of law or administration of law. Common lawyers will read with particular interest his attempt to show that they are not absent from the thinking of Anglo-American lawyers. The fifth chapter (The Deductive

Element in Legal Thinking) deals with the part played by deontic logic in legal thinking. Legal deduction, according to Dr. Brusiin, is part of logic, and therefore unlike the three characteristics of legal thinking dealt with in the preceding chapter, not part of the actual psychological process of legal thought. The present reviewer is inclined to question both the conception of deontic logic and its exclusion from the psychological set of events referred to as legal thinking. The last chapter (The Juristic Fundament and the Metaphysical in Legal Thinking) traces the connection between the thinking of the practising lawyer and his fundamental value-judgment on the law. This chapter includes some pertinent observations on the metaphysics of Marxist legal thought.

In the opinion of the present reviewer it would be highly desirable that at least some of these fragments should be translated into English and thus be made accessible to the English legal public.

E. J. Cohn.

Ranking, Spicer and Pegler's Executorship Law and Accounts. Eighteenth Edition. By H. A. R. J. Wilson, F.C.A., F.S.A.A. [London: Sir Isaac Pitman & Sons, Ltd. 1951. xxx and 384 pp. and (appendices) 48 pp. and (index and tables) 14 pp. 30s.]

This well-known book is primarily intended for students of accountancy and accountants. As such it would be unreasonable to expect a detailed account of all topics which could fall under its title. It gives a background of essential general principles and deals in greater detail with matters which are of greater accountancy interest. The present edition has been expanded by the inclusion of a substantial chapter on trusts and trustees. On the whole the book does give a clear and accurate account of the matters with which it deals and the balance of detail and generality has been well kept.

Perhaps at times statements are made with greater certainty than the state of the law warrants, and while the purpose of the book means that a balancing of cases would be out of place, nevertheless warnings of dangers might sometimes be usefully added. Thus *Re Griffith* [1911] 1 Ch. 246 is given with no hint of *Elliot* v. *Joicey* [1935] A.C. 209. Similarly the discussion of section 33 of the Wills Act mentions nothing of the conflict between *Re Hurd* [1941] Ch. 196 and *Re Allen's Trust* [1909] W.N. 181, although one of the cases is mentioned. *Re Sullivan* [1930] 1 Ch. 84 is perhaps the least happy example of the benefits to be derived by disclaiming an interest under a will in view of the comments in *Re Fisher* [1943] Ch. 377, a case later referred to but not connected. Perhaps too *Hickman* v. *Peacey* [1945] A.C. 304 is oversimplified.

These are simply matters of emphasis, but on a few occasions the statements of law are misleading. There is, at p. 4, an obscure illustration of the effect of section 2 of Lord Kingsdown's Act, and at p. 215 the burden of the cost of delivering objects specifically bequeathed which are situated abroad is wrongly placed. One particular omission—section 175 of the Law of Property Act, 1925—is perhaps unfortunate. There are also a few matters such as the accountability of executor-directors for their fees which might in such a book be expanded. Another is the treatment of section 35 of the Administration of Estates Act, 1925, or of the Limitation Act, the discussion of which is somewhat dispersed.

A great advantage of the book is that the operation of the rules is demonstrated, particularly by accounting examples. To a lawyer, or law students, this is a considerable advantage, and one feels that reciprocally some of the pure rules of law might be illustrated further. On the whole this is done most successfully in the chapter on trusts. It is often the application of the rule

which causes difficulty, and in such cases a lucid statement of principle will not suffice.

As one would expect, the chapters on apportionment, death duties, and annuities are relatively more detailed, and indeed are more satisfactory than the mere general passages. These chapters in particular may be of use to law students to demonstrate the working of the law and in them the use of illustrative examples is abundant and helpful.

Some of these comments may appear captious. They are not so intended, but it seems that especial care should be taken with statements of general principles to those who are not primarily lawyers, and who may pardonably rely on a textbook instead of resorting to the original authorities. For them warnings of dangers may be of great importance particularly in a subject where, as *Re Diplock* shows, a slight slip may cause immense trouble. Moreover these comments should in no way detract from the merits of a book which contains a great deal of useful information well set out, and which has been brought up to date with considerable care, but the better the book, the more one would like to see blemishes however slight removed. On a different level, the appendices giving extracts from statutes, etc., have been well chosen and the whole well produced, at a price which is for these days and for what the book gives a reasonable one. In the new edition it remains a book of considerable utility which accountants will welcome and by which law students can profit.

J. D. B. MITCHELL.

SHARE TRANSFER AND REGISTRATION. By A. K. MARTIN, F.C.I.S. [London : Stevens & Sons, Ltd. 1951. xii and 139 pp. 20s.]

COMPANY MEETINGS. By W. F. TALBOT, F.C.I.S., F.T.I.I. [London : Stevens & Sons, Ltd. 1951. xii and 178 pp. 22s. 6d.]

THESE books are the second and third of the new series of practical studies in Business Law and Administration. They have been written primarily for company officials and to meet the needs of students preparing for the examinations of the Chartered Institute of Secretaries.

The first is a useful account of the law and practice relating to the registration and share transfer department of a limited company. Though not intended for lawyers or law students it contains much information which should be useful to both and which cannot be found in books on company law. Of particular value is the attention paid to practical questions such as income tax, stamp duties and exchange control.

The second book is a straightforward and, frankly, rather dull account of the law and practice relating to the various types of meetings held in relation to limited companies. There is little evidence here of the attempt to relate principles "to their economic and social background" which is the avowed object of the series, and one cannot help thinking that Mr. Talbot could have made the book considerably more interesting if he had at least indicated the object of the various statutory rules instead of merely setting them out and indicating (as he admittedly does most helpfully) how the company official should comply with them. Certain statements are liable to mislead, *e.g.*, the reader of p. 15 may be left with the erroneous impression that a minority in number holding a majority of shares cannot ever enforce their will on the company, p. 31 implies that special notice is always required to re-appoint a director over the age of 70 whereas this need can be avoided by a provision in the Articles, and *Siemans* v. *Burns* [1918] 2 Ch. 324 does not in fact support the suggestion that two joint holders can be regarded as "*two* members" for the purposes of demanding a poll. Again at pp. 60–61 the author carefully evades a clear answer to the question which will occur to any reader, namely, whether Articles can effectively provide that revocations of proxies must be in

the hands of the company a certain period before the meeting. With these reservations, however, the book may be recommended as an accurate and thorough account of an important subject.

The unwelcome feature of the books is their price. The steeply rising costs of law books is a distressing feature of modern inflationary conditions which may not matter unduly to business men and legal practitioners, who will contrive that the replenishment of their libraries is treated as an expense deductible for tax purposes, but which hits students hard and has regrettable consequences for legal education. Even by modern standards £1 for only 108 pages of actual text in Mr. Martin's book seems excessive, and will, it is respectfully suggested, materially handicap this new venture of the publishers into a wider market in which prices tend to be less high than in specialised legal publishing.

L. C. B. G.

Der automatische Erwerb und Verlust der Staatsangehörigkeit durch völkerrechtliche Vorgänge, zugleich ein Beitrag zur Lehre von der Staatensukzession. By Dr. Hansjörg Jellinek. [Berlin, Detmold, Köln : Carl Heymanns Verlag KG. 1951. xxiv and 253 pp. Dm. 10.80.]

The effects upon nationality which result from changes of sovereignty are still a matter of considerable doubt in international law. In view of the practical importance of the question an exhaustive investigation is required. Dr. Jellinek's book, which constitutes an extended and revised edition of a thesis submitted in 1949 to the University of Freiburg, goes a long way to fulfil that object, though it is far from covering the whole field.

The author's main effort is devoted to supporting the view that, broadly speaking, in case of State succession an automatic change of nationality occurs. While he shows that this is in harmony with prevailing doctrine, he sadly neglects the very extensive judicial practice which has developed in many countries; in fact, no decision of a non-German tribunal seems to be referred to. On the other hand the author's work has the great advantage that it contains a considerable amount of material on very recent events which have not yet been fully explored, but cause difficulties in practice. The many cases of territorial changes which occurred during the inter-war period are discussed in a manner which both students and practitioners will find helpful. The value of this contribution is in no way impaired by the fact that the author's conclusions are not always convincing. His view that the Munich Agreement should today still be of any legal relevance (pp. 153–163) comes as a surprise. The statement that the United Kingdom has refused recognition to the annexation of the Baltic countries by Soviet Russia (pp. 171 *et seq.*) is wrong: *Tallina Laevauhisus* v. *Tallin Co.* (1946) 175 L.T. 285. On the vexed question of Austrian nationality the author takes the position that in 1945 a new Austrian nationality came into existence (pp. 142 *et seq.*); although he thus supports the decision of Lloyd Jacob J., reviewed (1952) 15 M.L.R. 100, his view is unlikely to meet with general approval.

This is undoubtedly in many respects a useful book and one hopes that the author will continue his research into the field he has chosen.

F. A. Mann.